

No. 11973

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. C. SIMMONS,

Appellant,

VS

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

AUG 28 1948

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

LATHAM & WATKINS

1112 Title Guarantee Building

411 West Fifth Street

Los Angeles 13, Calif.

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JAMES M. CARTER

United States Attorney

E. H. MITCHELL

GEORGE M. BRYANT

Assistants U. S. Attorney

EUGENE HARPOLE

Special Attorney, Bureau of Internal Revenue

600 U. S. Post Office and Court House

Los Angeles 12, Calif. [1*]

In the District Court of the United States
In and For the Southern District of California
Central Division

No. 5517-W Civil

E. C. SIMMONS,

Plaintiff,

v.

HARRY C. WESTOVER, Collector of Internal Revenue,
Defendant.

COMPLAINT FOR REFUND OF INCOME TAXES
PAID

Plaintiff, E. C. Simmons, by Latham & Watkins, his attorneys, presents this, his Complaint against the defendant herein, and for cause of action alleges as follows:

I.

Plaintiff, E. C. Simmons, resides at Beverly Hills, in the County of Los Angeles, State of California.

II.

Defendant, Henry C. Westover, was, on and subsequent to November 14, 1945, and still is, the duly appointed and acting Collector of Internal Revenue of the United States for the 6th District of California.

III.

This is a suit filed pursuant to the provisions of Section 24(20) of the Judicial Code as amended (28 U. S. C. A., Sec. 41(20)), [2] for the recovery of Federal income taxes erroneously and illegally collected from the plaintiff for the calendar year 1925 in the amount of \$1,255.18 and interest erroneously and illegally collected therewith in the

amount of \$1,904.09, together with interest on the total amount of \$3,159.27.

IV.

On or about June 5, 1929, the plaintiff executed an "Agreement as to Final Determination of Tax Liability" for the years 1925, 1926, and 1927 in the principal sum of \$8,869.72 and agreed to the assessment of any deficiency included therein, and on or about October 23, 1929, said agreement was approved and accepted by the Commissioner of Internal Revenue. Of said principal sum, there remained unpaid from and after August 15, 1933, a balance of \$1,255.18.

V.

On or about November 14, 1945, plaintiff paid to the defendant herein, in response to said defendant's notice and demand therefor, said balance of \$1,255.18, together with interest in the amount of \$1,904.09, or a total of \$3,159.27.

VI.

More than six (6) years had elapsed between the date of the assessment mentioned in paragraph IV and the date of payment mentioned in paragraph V, to wit: more than sixteen (16) years.

VII.

The collection of said tax and interest was barred after six years from the date of said assessment pursuant to the provisions of Section 276(c) of the Internal Revenue Code (26 U. S. C. A., Sec. 276(c)).

VIII.

On December 11, 1945, plaintiff filed with the defendant, as Collector of Internal Revenue, at Los Angeles,

California, a claim for refund in the amount of \$3,159.27, plus interest, [3] representing the tax and interest paid by him as alleged in paragraph V for said year 1925. A true copy of said claim and of the statement attached thereto is hereto attached, marked "Exhibit A" and is by reference made part of this Complaint.

IX.

More than six (6) months have elapsed since the filing of said claim and no decision has been rendered thereon.

Wherefore, plaintiff prays that a judgment may be entered herein in favor of the plaintiff and against the defendant for \$3,159.27, plus interest thereon, from November 14, 1945, at 6% per annum, together with costs of suit, and for such other and further relief as to the Court may seem proper.

LATHAM & WATKINS

By Richard W. Lund

Attorneys for Plaintiff

1112 Title Guarantee Building

Los Angeles 13, California [4]

[Verified.]

"EXHIBIT A"

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California

County of Los Angeles—ss:

[Type or Print] Name of taxpayer or purchaser of stamps E. C. Simmons.

Business address 540 North La Brea Avenue, Los
(Street)

Angeles 36, California.

(City) (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Sixth California.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1925, to December 31, 1925.
3. Character of assessment or tax—Income tax and interest thereon.
4. Amount of assessment, \$3,159.27; dates of payment November 14, 1945.
5. Date stamps were purchased from the Government....
6. Amount to be refunded \$3,159.27.

7. Amount to be abated (not applicable to income or estate taxes)..... \$.....
8. The time within which this claim may be legally filed expires, under Section 322(b)(1) of the Internal Revenue Code on November 14, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

See statement attached. [5]

* * * * *

E. C. SIMMONS CLAIM FOR REFUND

On November 14, 1945, the taxpayer paid, under protest, to the Collector of Internal Revenue at Los Angeles, California, in response to a demand therefor, additional income taxes for the calendar year 1925 in the amount of \$1,255.18 together with interest thereon in the amount of \$1,904.09, or a total of \$3,159.27.

Said tax and interest was not collected within six years after assessment nor within a reasonable time after the rejection of taxpayer's offer in compromise filed in 1933 at which time he agreed that the tax might be collected by distraint or by a proceeding in court begun at any time.

The collection of said tax and interest was, therefore, barred by the provisions of Section 276(c), I. R. C., and the payment made constitutes an overpayment as defined by Section 3770(a)(2), I. R. C.

Accordingly, said payment is to be refunded to the taxpayer and, for that purpose, this claim is filed.

[Endorsed]: Filed Jun. 27, 1946. Edmund L. Smith, Clerk. [6]

[Title of District Court and Cause]

ANSWER

The defendant in answer to plaintiff's complaint herein admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof, except that it is denied that the collection of the taxes and interest involved was erroneous or illegal.

IV.

Admits the allegations contained in Paragraph IV of the complaint.

V.

Admits the allegations contained in Paragraph V of the complaint.

VI.

No answer is made to Paragraph VI thereof since Paragraph IV, to which [7] reference is made in Paragraph VI, does not mention an assessment made but only an agreement that an assessment may be made in the future.

VII.

Denies the allegations contained in Paragraph VII of the complaint, and alleges that in and by the "Agreement as to Final Determination of Tax Liability" executed between the plaintiff and the Government as alleged in Para-

graph IV of the complaint, the plaintiff agreed to a deficiency in his income tax for the year 1925 in the amount of \$5,281.66; that pursuant to the Agreement, income taxes in the amount of \$5,281.66 were assessed against the plaintiff on October 19, 1929, together with interest thereon in the amount of \$1,053.36, a total of \$6,335.02 for the year 1925; that pursuant to the Agreement, the Commissioner of Internal Revenue determined overassessments for 1926 of \$795.45 and for 1927 of \$2,067.57, and that such overassessments were, with the consent of the plaintiff, credited against the deficiency for 1925, leaving an outstanding balance of \$3,472.06; that thereafter payments were made by plaintiff during the period 1930-1934, which reduced the balance to \$1,255.18; that on August 15, 1932, plaintiff filed an offer in compromise (Form 656) with the Collector of Internal Revenue at Los Angeles, California, in the amount of \$250, payable in instalments, alleging that he was unable to raise funds and representing that he was insolvent; that such offer contained a specific provision that—

* * * the taxpayer hereby expressly waives—

* * * * *

2. The benefit of any statute of limitations affecting the collection of the liability sought to be compromised, and in the event of the rejection of the offer, expressly consents to the extension of any statute of limitations affecting the collection of the liability sought to be compromised by the period of time (not to exceed two years) elapsed between the date of the filing of this offer and the date on which final action thereon is taken.

that the offer was rejected by the Commissioner by letter dated October 18, 1932; that under date of July 5, 1933,

the plaintiff executed a Tax Collection Waiver which provided as follows: [8]

It is hereby agreed by and between E. C. Simmons of Los Angeles, party of the first part, and the Commissioner of Internal Revenue, party of the second part, that the amount of \$3,472.06, representing an assessment of Income tax for the year 1925 made against the said party of the first part, appearing on the Nov. 590046-1929 assessment list, page....., line, for the Sixth District of California, may be collected (together with such interest, penalties or other additions as are provided for by law) from said party of the first part by distraint or by a proceeding in court begun at any time.

that the Waiver was executed by the Commissioner under date of March 15, 1934; that on May 21, 1936, the plaintiff filed another offer in compromise on Form 656 with the Collector of Internal Revenue at Los Angeles, alleging inability to pay; that this second offer shows as the "Total amount" \$2,316.88, but that it is in reality an offer of \$100, since the offer shows the amount of \$2,316.88 as consisting of \$100 in cash and \$2,216.88 previously paid on account of the tax liability; that this offer contains the specific provision that—

* * * the proponent hereby expressly waives:

* * * * *

2. The benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending and for one year thereafter.

that this offer was rejected by letter dated August 9, 1938; that the plaintiff has never given any notice to the Commissioner that the plaintiff would treat the Tax Collection Waiver as at an end after a reasonable time or at any other time, and that the Tax Collection Waiver remains in full force and effect, and that the collection of the tax in question was not barred when such tax was collected from the plaintiff.

VIII.

Admits the allegations contained in Paragraph VIII of the complaint; denies the allegations contained in the claim for refund except as similar [9] allegations are admitted in this answer.

IX.

Admits the allegations contained in Paragraph IX of the complaint.

Wherefore, defendant prays that plaintiff take nothing by his complaint herein, and that the same be dismissed and that defendant recover his costs in this behalf expended.

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE, Special Attorney,
Bureau of Internal Revenue

By George M. Bryant

Attorneys for Defendant [10]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 27, 1946. Edmund L. Smith,
Clerk. [11]

[Title of District Court and Cause]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action, acting through their respective attorneys, that the following facts are true:

I.

This action involves an alleged overpayment of Federal income taxes for the calendar year 1925.

II.

The plaintiff is an individual residing at Beverly Hills, California, and the defendant is and has been since prior to November 14, 1945, the duly appointed and Acting Collector of Internal Revenue of the United States for the Sixth District of California.

III.

On or about June 5, 1929, plaintiff executed an "Agreement as to Final Determination of Tax Liability" fixing the amounts of his income tax liability with respect to the years 1925, 1926 and 1927, which [12] agreement was subsequently approved and accepted by the Commissioner of Internal Revenue.

IV.

On or about October 19, 1929, pursuant to the above "Agreement as to Final Determination of Tax Liability," there were assessed against the plaintiff income taxes for the year 1925 in the amount of \$5,281.66, together with interest thereon in the amount of \$1,053.36, a total of \$6,335.02, against which were credited overassessments for the years 1926 and 1927 in the amounts of \$795.45 and \$2,067.51 respectively, leaving a balance due of \$3,472.06. The Commissioner of Internal Revenue sent

the assessment list containing the foregoing assessment to the Collector of Internal Revenue for the First District of Texas and such Collector received said list on or about November 1, 1929. The foregoing Collector issued against plaintiff a first notice and demand on November 4, 1929, and a second notice and demand with respect to the foregoing liabilities on November 18, 1929. Due to the plaintiff's removal from the First District of Texas to the Sixth District of California, the account for the above income tax liabilities was transferred from the Collector for the First District of Texas to the Collector of Internal Revenue for the Sixth District of California. The Collector for the district last mentioned issued a warrant of distraint with respect to the above liabilities on December 17, 1929, and on December 19, 1929, such Collector filed with the Recorder of Los Angeles County, California, a notice of lien with respect to plaintiff's above income tax liabilities.

V.

From October 19, 1929 to and including August 15, 1933, plaintiff made certain payments on said outstanding balance, which reduced said balance of \$3,472.06 to a balance as of August 15, 1933 of \$1,255.18, exclusive of and not counting interest accruing subsequent to the above assessment on or about October 19, 1929. [13]

VI.

On August 1, 1932, plaintiff executed an "Offer in Compromise" on Treasury Department Form 656 and this offer was filed with the Collector of Internal Revenue at Los Angeles, California, on August 15, 1932. The above Form 656 is a form with printed matter on both the face and the reverse side thereof. Attached hereto

and incorporated herein by reference, is a photostatic copy of the face of the above Form 656, which has been marked Exhibit A-1. Said Exhibit shows that it was executed by plaintiff on August 1, 1932, and that on August 25, 1932 the Commissioner of Internal Revenue, by his duly authorized agent, signed on the face of the above offer with respect to the following language appearing thereon: "Waiver of Statute of Limitations is hereby accepted, and Offer will be considered and acted upon in due course."

VII.

Attached hereto and incorporated herein by reference is a photostatic copy of the reverse side of the above Form 656, which has been marked Exhibit A-2. Said exhibit represents the Collector's recommendation and report to the Commissioner of Internal Revenue as of August 25, 1932, respecting the offer set forth on Exhibit A-1. Exhibit A-2 was executed by the Collector of Internal Revenue for the Sixth District of California on August 25, 1932, and then transmitted to the Commissioner of Internal Revenue in due course.

VIII.

Attached hereto and incorporated herein by reference is a photostatic copy of plaintiff's July 20, 1932 letter to the Commissioner of Internal Revenue, which has been marked Exhibit A-3. Attached hereto and incorporated herein by reference is a photostatic copy of a statement of assets and liabilities which plaintiff submitted with his above letter of July 20, 1932. The foregoing statement has been marked Exhibit A-4. Plaintiff attached Exhibit A-3 and Exhibit A-4 to his above August 1, 1932 Offer in Compromise when he submitted the same to the Commissioner of Internal Revenue. [14]

IX.

On October 18, 1932, the Commissioner of Internal Revenue wrote the plaintiff rejecting the above Offer in Compromise. Attached hereto, incorporated herein by reference and marked Exhibit B is a copy of the Commissioner's October 18, 1932 letter of rejection to the plaintiff.

X.

Between the above date of October 18, 1932, and the hereinafter mentioned date of May 6, 1936, there was no Offer in Compromise pending before the Bureau of Internal Revenue with respect to the above income tax liabilities. On July 5, 1933, plaintiff executed a tax collection waiver with respect to his above income tax liabilities for the year 1925 and on March 5, 1934, the Commissioner of Internal Revenue, by his duly authorized agent, accepted the said waiver executed by plaintiff on July 5, 1933. This waiver was not submitted in connection with any Offer in Compromise. Attached hereto, incorporated herein by reference and marked Exhibit C is a photostatic copy of the above tax collection waiver showing execution thereof by the plaintiff on July 5, 1933 and execution thereof by the Commissioner of Internal Revenue on March 5, 1934.

XI.

On May 6, 1936, plaintiff executed an Offer in Compromise on Treasury Department Form 656 and this offer was filed with the Collector of Internal Revenue at Los Angeles, California, on May 21, 1936. The above Form 656 is a form with printed matter on both the face and the reverse side thereof. Attached hereto and incorporated herein by reference is a photostatic copy of the face of the above Form 656, which has been marked

Exhibit D-1. Said exhibit shows that it was executed by plaintiff on May 6, 1936, and that on May 29, 1936, the Commissioner of Internal Revenue, by his duly authorized agent, signed on the face of the above offer with respect to the following language appearing thereon: "Waiver of statutory period of limitations is hereby accepted, and offer will be considered and [15] acted upon in due course."

XII.

Attached hereto and incorporated herein by reference is a photostatic copy of the reverse side of the above Form 656, which has been marked Exhibit D-2. Said Exhibit represents the Collector's recommendation and report to the Commissioner of Internal Revenue as of May 29, 1936, respecting the offer set forth on Exhibit D-1. Exhibit D-2 was executed by the Collector of Internal Revenue for the Sixth District of California on May 29, 1936, and then transmitted to the Commissioner of Internal Revenue in due course.

XIII.

Attached hereto and incorporated herein by reference is a photostatic copy of "Statement of 1925 income tax of E. C. Simmons" which has been marked Exhibit D-3. Attached hereto and incorporated herein by reference is a photostatic copy of a "Financial Statement of E. C. Simmons," which has been marked Exhibit D-4. Exhibits D-3 and D-4 were prepared by plaintiff and submitted by him in connection with his above Offer in Compromise executed on May 6, 1936.

XIV.

Attached hereto and incorporated herein by reference is a photostatic copy of the copy of the "Tax Collection Waiver" executed by plaintiff on July 5, 1933, which

photostatic copy has been marked Exhibit D-5. The above Exhibit D-2 reads in part as follows: "Were any collection waivers filed? . . . Yes . . . If so, furnish copies . . . attached . . .". Exhibit D-5 represents the collection waiver referred to in the above answer of "Yes" and such exhibit represents the copy of a collection waiver, which the Collector of Internal Revenue for the Sixth District of California "attached" when forwarding to the Commissioner of Internal Revenue (see Exhibit D-2) plaintiff's offer in Compromise executed on May 6, 1936, (see Exhibit D-1). Exhibit D-5 is a copy of plaintiff's original "Tax Collection Waiver" which he executed on July 5, 1933. (See Exhibit C hereto.) [16]

XV.

Attached hereto, marked Exhibit E and incorporated herein by reference, is a copy of the August 9, 1938 letter from the Acting Commissioner of Internal Revenue to the plaintiff whereby the Government rejected plaintiff's above Offer in Compromise executed on May 6, 1936. Plaintiff submitted no further Offers in Compromise and subsequent to the date of August 9, 1938, no Offer in Compromise from the plaintiff was pending or under consideration by the Bureau of Internal Revenue.

XVI.

On or about October 9, 1945, one of the Deputies from the Office of the Collector of Internal Revenue for the Sixth District of California personally called upon and made a demand of plaintiff with respect to the income tax liabilities hereinbefore mentioned. The plaintiff on November 14, 1945, paid to the defendant herein the above balance of \$1,255.18 (see paragraph V hereof) together with interest in the amount of \$1,904.09, or a total of \$3,159.27. In addition to the figure last mentioned plaintiff paid the sum of fifty cents as the fee for obtaining

the release with respect to the lien, which had been created as set forth in paragraph IV hereof.

XVII.

No notice with respect to revoking the above "Tax Collection Waiver" executed by plaintiff on July 5, 1933, and accepted by the Commissioner of Internal Revenue on March 5, 1934, was given unless plaintiff's above offer in compromise executed on May 6, 1936, and filed with the Collector of Internal Revenue on May 21, 1936, constituted such notice.

~~XVIII.~~

~~Either party hereto may at the time of trial or writing briefs herein or any other time question the relevancy and/or materiality of any of the facts or exhibits herein stipulated. It is further agreed that this stipulation of facts shall not prejudice the right of either [17] party hereto to introduce such other and additional evidence as is not inconsistent with or contrary to the facts herein stipulated. [LPO H.C.D.]~~

Dated this 5th day of February, 1947.

LATHAM & WATKINS

By Henry C. Diehl

Attorneys for Plaintiff

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Asst. United States Attorneys

EUGENE HARPOLE and

LOREN P. OAKES

Special Attorneys

Bureau of Internal Revenue

By Loren P. Oakes

Attorneys for Defendant [18]

EXHIBIT A-1

Form 656—Revised March, 1929

Treasury Department

Internal Revenue Service

OFFER IN COMPROMISE

To be filed with collector for your district

Forms to be submitted in duplicate

For Use of Collector

Class of tax Income.

Special deposit

account No. 14624.

Serial No. 217.

Amount paid, \$25—

(Cashier's stamp)

Certified Check. Cash. M. O.

E. C. Simmons

(Name of taxpayer)

848 S. Oxford, Los Angeles, California

(Address of taxpayer)

Date—July 20, 1932

Commissioner of Internal Revenue:

Through the Collector of Internal Revenue at Los Angeles, Cal.

Sir:

The following offer in compromise is submitted to you by the undersigned:

Charges of ~~violation of law or~~ failure to meet an internal revenue obligation have been made against the tax-

payer named above as follows: failure to pay I. T. for 1925 amount of \$1330.18 and interest.

(State specifically the pending charge and/or kind of tax and period involved)

Received in

Sep. 3, 1932

General Counsel's Office

Bureau of Internal Revenue

ADMC

Received With Remittance

6th District of California

Aug. 15, 1932

Los Angeles Office

O. G. S.

Date and place of alleged violation.....

The alleged violation or failure is due to the following cause or causes: inability to raise sufficient funds with
(State in detail)

which to make payment.

\$25 paid herewith and balance \$25 monthly.

The sum of \$250.00 is hereby tendered voluntarily with request that it be accepted as a compromise offer and that release be granted the undersigned from the following liability resulting from the violation or failure specified: 1925 income tax in amount of \$1330.18 with accrued interest.

The following facts and reasons are submitted as grounds for acceptance of the offer: insolvent, see statement attached.

(If space provided is insufficient, attach supplemental affidavit and supporting evidence)

It is understood that this *offer* does not afford relief from the liability incurred unless and until it is actually accepted by the Commissioner with the advice and consent of the Secretary of the Treasury, and for cases in suit with the recommendation of the Attorney General of the United States, costs, if any, to be paid by the undersigned.

In making this offer, and as a part of the consideration thereof, the taxpayer hereby expressly agrees that all payments and other credits heretofore made to the account(s) for the year(s) under consideration, for which an unpaid liability exists, shall be retained by the United States, and, in addition, the taxpayer hereby expressly waives—

1. Any and all claims to refunds or overpayments to which he may be entitled under the internal revenue laws for any years, calendar or fiscal, or any period fixed by law, expiring prior to the date of acceptance of the offer, due through overpayment of any tax, interest, or penalty, or interest on overpayments or otherwise, as is not in excess of the difference between the tax liability sought to be compromised herewith and the amount herein offered, and agrees that the United States may retain such refunds or overpayments, if any.

2. The benefit of any statute of limitations affecting the collection of the liability sought to be compromised, and in the event of the rejection of the offer, expressly consents to the extension of any statute of limitations affecting the collection of the liability sought to be compromised by the period of time (not to exceed two years)

elapsed between the date of the filing of this offer and the date on which final action thereon is taken.

(If offer is made by agent, the reason therefor
must be stated on this line)

E. C. Simmons

(Signature of taxpayer or agent)

Sworn and subscribed before me this 1st day of Aug.,
1932.

B. E. Northing

(Signature of officer administering oath)

Waiver of statute of limitations is hereby accepted, and
offer will be considered and acted upon in due course.

Commissioner of Internal Revenue

By.....

Chief Office Deputy

Collector of Internal Revenue [19]

EXHIBIT A-2

COLLECTOR'S RECOMMENDATION

Commissioner of Internal Revenue, Washington, D. C.:

Herewith is an offer made by E. C. Simmons, 848 South Oxford St., Los Angeles, Cal. in compromise of liability incurred because Inability to make further payments on 1925 income tax liability.

Return was filed on Form.....for 1925 on.....
(Period) (Date)

This case is (not) in suit. Tax assessed in Commissioner in First District of Texas.

Record of Assessments and Payments

Entries in detail to be made by the Collector. Show in the tenth column by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in eighth column.

Kind of Assessment, Tax, Penalty, Interest and Taxable Year	List	Year	Month	Account No. or Page Line	Amount Assessed
Inc Tax	1929	1925	Nov	590046	5281 66
Int to 7/12/29		"	"	"	1053 36
					<hr/> 6335 02

Paid, Abated or Credited		Balance Due	Pd. Ab. Cr. }	Schedule Number
Date	Amount			
10/31/29	2862 96			Credit 1st Texas
1/ 3/30	241 88			Paid
8/29/30	250 00			"
3/19/31	250 00			"
4/19/31	250 00			"
6/23/31	250 00			"
8/20/31	150 00			"
9/22/31	150 00			"
10/20/31	150 00			"
11/23/31	150 00			"
12/20/31	150 00			"
1/20/32	150 00			"
	5004 84	1330 18		

[STAMPED]:

THIS FORM 656
FOR MEMORANDUM PURPOSES ONLY
OFFER REJECTED 10-18-32
REJECTION SCHEDULE (DATE) 10-27-32

Compromise Offer

Amount of previous tender (\$25.00 herewith)

Balance \$25.00 monthly.

Amount of this tender Tentative..... \$250.00

Total amount offered 250.00

Demands Issued

Form 7658 Date 11/ 4/29 1st Texas

7659 11/18/29 " "

69 12/17/29 6th Calif.

Was a notice of lien filed? Yes 6th District of California
Los Angeles County Dec. 19, 1929.

(If so, when and where)

Was a bond for collection filed? No.

(If so, furnish copy of same)

Was a collection waiver filed? No.

(If so, furnish copy of same)

I recommend that the offer be.....for the
(Accepted or rejected)

following reasons (state same in full):

Being investigated under the provisions of mimeograph
#3832.

Date signed....., 19.....

Collector 6th District of California. [20]

EXHIBIT A-3

Los Angeles, California,
July 20, 1932.

Taxpayer:

E. C. Simmons
808 S. Oxford
Los Angeles, Cal.

Commissioner of Internal Revenue
Through Collector of Internal
Revenue at Los Angeles

Sir:

In connection with attached offer of compromise there is submitted for your consideration:

Additional tax of \$3472.06 became payable at time when my cash position made it impossible to make payment in lump sum. Under an installment arrangement I have paid a total of \$2141.88, leaving a balance, as of July 8, of \$2143.42, interest amounting to \$813.24, and tax of \$1330.18. The last payment, of \$150.00, was made on January 20, 1932. Since that time my financial condition steadily has grown worse, due to successive cuts of salary.

As financial editor of Los Angeles Evening Herald and Express I receive \$180 weekly, my sole income. From this I pay \$216 monthly to an assistant and \$100 monthly to my mother on an old indebtedness. Apartment rent,

household expenses, apparel, doctors and other necessary family expenses aggregate \$385 a month.

In order to hold my position it is necessary that I maintain a standard of living far beyond what otherwise would be justified by my income. I must keep in touch with important people, on a fairly equal footing and do a minimum amount of entertaining, at whatever sacrifice, since my present employment is the direct result of contacts made with my employers before financial troubles multiplied; and I feel quite sure my term would be short indeed once it were known that I am actually bankrupt.

My life insurance premiums average \$250 monthly. These I have managed to keep up by exhausting the loan value of the policies, which will be in default before the end of the current year—something of a calamity since I have lately been pronounced uninsurable.

Prior to the depression I was engaged in the stock brokerage business in Los Angeles. I was caught in the crash. Value of my holdings diminished. I hung on, hoping for a turn of the tide, until I had neither business nor securities.

On page following appears statement of assets and liabilities as of above date, showing an excess of liabilities over assets of \$32,283.35½.

E. C. Simmons [21]

EXHIBIT A-4

ASSETS

	Cost	Current Value
500 shares Builders' Incorporated Mortgages aggregating more than \$60,000 and taxes of more than \$6,000 in default.	\$ 50,000.00	nil
5000 shares of Exchange Publishing Co. Corporation inactive; assets nil unsatisfied judgments outstanding for some \$290.	50,000.00	nil
50 shares Nash-El Paso Motors, Inc. Company inactive with no assets	5,000.00	nil
125 White Sewing Machine notes, no market	468.75	nil
1000 shares Mosqueteros Mining Co., no market	460.00	nil
100 Bach Aircraft. Company out of business	112.50	
1 share Rio Grande Oil Co.	36.50	\$ 2.37½
Membership L. A. Curb Exchange, no market	100.00	nil
Cash	197.00	197.00
	<hr/>	<hr/>
	\$106,374.75	\$199.37½

LIABILITIES

Notes Payable—

Exchange Publishing Co. \$ 8,707.73

Mrs. N. C. Simmons

(Approx.) 2,000.00

Repurchase Contract—

Builders Inc. (Approx.) 21,000.00

Miscellaneous bills past due 775.00

\$ 32,482.73

Excess of liabilities over

assets \$ 32,283.35½

The above in addition to Federal income tax, principal and interest as of July 8, 1932 of \$2143.42. [22]

EXHIBIT B

GC:Adm:C:EMH
260894

Oct. 18, 1932

Mr. E. C. Simmons,
848 South Oxford Avenue,
Los Angeles, California.

Sir:

Careful consideration has been given to the tentative offer of \$250.00 submitted by you in compromise of outstanding balance of income tax for the year 1925, plus assessed interest, in the total amount of \$1,330.18, plus accrued interest, and your offer is hereby rejected as the evidence in the file does not indicate that you are insolvent or unable to pay the full amount of the tax.

You should promptly take up the matter of settlement of this liability with the Collector of Internal Revenue at Los Angeles, California, who is charged with responsibility for collection and is being notified of the rejection of your offer.

Respectfully,

(Signed) David Burnet
David Burnet
Commissioner

- 1 cc Collector, Los Angeles, Calif.
- 3 cc Clearing Division, Comp. Subsec.
- 1 cc A. & C. Unit
- 1 cc I.R.A. in Chge., Los Angeles, Calif. [23]

EXHIBIT C

TAX COLLECTION WAIVER

July 5, 1933

It is hereby agreed by and between E. C. Simmons of Los Angeles, party of the first part, and the Commissioner of Internal Revenue, party of the second part, that the amount of \$3472.06, representing an assessment of income (kind of tax) tax for the year(s) 1925 made against the said party of the first part, appearing on the Nov. 590046-1929 list assessment list, page....., line....., for the Sixth District of California, may be collected (together with such interest, penalties or other additions as are provided for by law) from said party of the first part by distraint or by a proceeding in court begun at any time.

Edward C. Simmons

(Taxpayer)

By.....

Guy T. Helvering

Commissioner of Internal Revenue
Chief Office Deputy

3/5/34 By E. M. Cohee

Collector of Internal Revenue
E.M.C.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [24]

EXHIBIT D-1

Form 1656
Treasury Department
Internal Revenue Service
Revised 1934

OFFER IN COMPROMISE

To be filed in duplicate with collector for
your district

For Use of Collector
Class of tax Income
Special deposit
 account No. 891385
Serial No. 54
Amount paid, \$100.00
 (Cashier's stamp)
Certified Check. Cash. M.O.

E. C. Simmons
 (Name of taxpayer)
523 West Sixth St., Los Angeles, Cal.
 (Address of taxpayer)

Date—April 23, 1936

Commissioner of Internal Revenue:

Through the Collector of Internal Revenue at Los
Angeles

Sir:

The following offer in compromise is submitted to you
by the undersigned:

Charges of violation of law or failure to meet an in-
ternal revenue obligation have been made against the pro-

ponent as follows: Failure to pay in full additional 1925 income tax, payable 11/1/29 following ruling that tax accrued in 1925 instead of 1925 and 1926.

(State specifically the pending charge and/or kind of tax and period involved)

Date and place of alleged violation November 1, 1929
—El Paso, Texas.

The alleged violation or failure is due to the following cause or causes: Inability to pay owing to lack of funds.

(State in detail)

To secure the release of the proponent from the liability resulting from the violation or failure above specified, the sum of \$2,316.88 is hereby tendered voluntarily with request that it be accepted in compromise of the said liability, to wit: tax and interest as per attached schedule, \$2,216.88 of which already has been paid, as per schedule, and check is enclosed for remaining \$100. Since it has been necessary for me to borrow the \$100, its return is requested in event this offer fails to meet the approval of the commissioner.

(The liability includes tax or other principal liability, interest, and/or ad valorem penalty; therefore the *total* liability for each period involved, for which compromise is sought, should be stated.)

The following facts and reasons are submitted as grounds for acceptance of this offer: I am now and have been for the last several years without regular income and have subsisted upon borrowed money largely. My liabili-

ties, principally demand notes, exceed \$28,000 with practically no offsetting assets.

(If space provided is insufficient, attach supplemental affidavit and supporting evidence)

It is understood that this offer does not afford relief from the liability sought to be compromised unless and until it is actually accepted by the Commissioner, with the advice and consent of the Secretary of the Treasury.

In making this offer, and as a part consideration thereof, the proponent hereby expressly agrees that all payments and other credits heretofore made to the account(s) for the period(s) under consideration shall be retained by the United States, and, in addition, the proponent hereby expressly waives:

1. Any and all claims to amounts of money to which the proponent may be entitled under the internal revenue laws for any years, calendar or fiscal, or for any period fixed by law, expiring prior to the date of acceptance of this offer, due through over-payment of any tax or other liability, including interest and/or ad valorem penalty, or interest on overpayments, or otherwise, as is not in excess of the difference between the liability sought to be compromised hereby and the amount herein offered, and agrees that the United States may retain such amounts of money, if any.

2. The benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assess-

ment and/or collection for the period during which this offer is pending and for one year thereafter.

(If offer is made by agent, the reason therefor must be stated on this line)

E. C. Simmons

(Signature of proponent or agent)

(Address of agent)

Sworn to and subscribed before me this 6 day of ~~Apr.~~ May, 1936.

James G. Lytho, D.C.

(Signature of officer administering oath)

Waiver of statutory period of limitations is hereby accepted, and offer will be considered and acted upon in due course.

Guy T. Helvering

Commissioner of Internal Revenue

May 29 1936

By E. M. Cohee [Stamped]: Chief Office Deputy
E.M.C. Collector of Internal Revenue

[Stamped]: Received Jul 1, 1936. Technical Staff.

[Stamped]: Received Records Division, Bankruptcy Unit. Jun. 19, 1936. Sub Section G.

[Stamped]: Collr. Int. Rev. 6th California. May 21, 1936. Paid.

[Stamped]: Posting. May 22, 1936. Date. [25]

EXHIBIT D-2

DATA AND RECOMMENDATION SUBMITTED
BY THE COLLECTOR

Commissioner of Internal Revenue, Washington, D. C.:

On reverse side hereof is an offer made by E. C. Simmons, 523 West Sixth St., Los Angeles, Calif., in compromise of liability incurred because Inability to pay additional 1925 tax and interest.

Return was filed on Form.....for.....
(Period)

on.....
(Date)

This case is (not) in suit.

Record of Assessments and Payments

Entries in detail should be made in the appropriate columns below. The next to the last column should show by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the preceding column and the last column should show the balance due. All questions below should be fully answered.

Kind of Assessment, Tax, Penalty, Interest and Taxable Year	List	Year	Month	Account No. or Page Line	Amount Assessed
Inc. Tax	1929	1925	Nov.	590046	3285.76
Paid, Abated or Credited				Pd. } Ab. } Cr. }	Schedule No.
<u>Date</u>		<u>Amount</u>			<u>Balance Due</u>
1/·3/30		241.88		Pd.	
8/29/30		250.00		"	
3/19/31		250.00		"	
4/19/31		250.00		"	
6/23/31		250.00		"	
8/20/31		150.00		"	
9/22/31		150.00		"	
10/20/31		150.00		"	
11/23/31		150.00		"	
12/20/31		150.00		"	
1/20/32		150.00		"	
8/15/33		75.00		"	
6/11/34		1255.18		Abt. Uncol	7249.

[STAMPED]:

THIS FORM 656

FOR MEMORANDUM PURPOSES ONLY

OFFER REJECTED 8-9-38

REJECTION SCHEDULE (DATE) 8-12-38

Compromise Offer

Amount of previous tender..... \$.....

Amount of this tender.....Paid \$100.00

Total amount offered..... “ 100.00

Demands Issued

Form 69 Date Dec. 17, 1929

Form..... Date.....

Form..... Date.....

Notice of lien was filed on the 20 day of Dec., 1929 at
Los Angeles, Calif.

Was a bond for collection filed?.....

If so, furnish copy of same.....

Were any collection waivers filed? Yes

If so, furnish copies attached

Was the Revenue Agent in Charge requested to make an
investigation? Yes If so, when? 5/19/36.

I recommend* that the offer be.....

(Accepted or rejected)

for the following reasons:

Being investigated under the provisions of Mim.
#3832.

Date signed May 29, 1936.

Nat Rogan

Collector 6th District of California

*Recommendation should always be made if report of
deputy collector is forwarded with this form; if not, the
collector's recommendation should be submitted with the
report of the deputy collector. [26]

EXHIBIT D-3

STATEMENT OF 1925 INCOME TAX
OF E. C. SIMMONSTransferred to Sixth California District From Texas
November, 1929Attached to and made a part of Offer in Compromise
Dated April 23, 1936

Transferred to 6th Cal. for Collection:		\$3472.06
Paid 12/31/29	\$241.88	Treas. Ck.
9/12/30	250.00	
3/19/31	250.00	
4/19/31	250.00	
6/23/31	250.00	
8/20/31	150.00	
9/22/31	150.00	
10/20/31	150.00	
11/21/31	150.00	
12/20/31	150.00	
1/20/32	150.00	
8/15/33	75.00	2216.88
		<hr/>
Bal. of tax		1255.18
Accrued interest from 11/1/29 to 4/10/36		1341.42
		<hr/>
Total tax and Int. to Apr. 10/36		\$2596.60
		[27]

EXHIBIT D-4

FINANCIAL STATEMENT OF
E. C. SIMMONS523 West Sixth Street
Los Angeles, Calif.

As of April 30, 1936

Submitted to Commissioner of Internal Revenue through
Collector of Internal Revenue at Los Angeles, California,
in connection with Offer in Compromise hereto attached.

Assets:

Miscellaneous items	\$ 1008.17
---------------------	------------

Liabilities:

Demand notes payable	\$23525.18	
U. S. Treasury a/c Income tax	2596.60	
Simmons & Peckham	2084.74	
Misc. personal accounts	1500.00	
	<hr/>	29706.52
Liabilities in excess of assets		\$28698.35

E. C. Simmons

Signature of proponent

Sworn to and subscribed before me this 6 day of
May, 1936.

James G. Lytho, D.C.

Signature of officer administering oath [28]

EXHIBIT D-5

COPY

TAX COLLECTION WAIVER

July 5, 1933

It is hereby agreed by and between E. C. Simmons of Los Angeles, party of the first part, and the Commissioner of Internal Revenue, party of the second part, that the amount of \$3472.06, representing an assessment of Income tax for the year 1925 made against the said party of the first part, appearing on the Nov. 590046—1929 list assessment list, page..... line....., for the Sixth District of California, may be collected (together with such interest, penalties or other additions as are provided for by law) from said party of the first part by distraint or by a proceeding in court begun at any time.

(Sgd.) Edward C. Simmons

“ Guy T. Helvering

Commissioner of Internal Revenue

3/15/34 By E. M. Cohee

Chief Office Deputy [29]

EXHIBIT E

C-TS:PL

CAD:ORM

Aug. 9, 1938

Mr. E. C. Simmons,
523 West 6th Street,
Los Angeles, California.

Sir :

Reference is made to your offer of \$2,316.88, consisting of \$100.00 cash and \$2,216.88 previously paid on

account of your tax liability, submitted through the office of the collector of internal revenue, to compromise your unpaid income tax liability, including interest, for the year 1925.

The tax liability sought to be compromised was made the subject of a final closing agreement entered into by and between you and the Commissioner of Internal Revenue under Section 606 of the Revenue Act of 1928 which was approved on schedule 3159. Accordingly, the tax is legally due.

Careful consideration has been given to the above offer and it is hereby rejected for the reason that the tax is legally due and an amount in excess of the offer appears collectible. There is no authority in the law for the acceptance of an offer in compromise of tax legally due for an amount less than can be collected.

It is suggested that you promptly take up the matter of payment of this liability with the Collector of Internal Revenue, Los Angeles, California, who is charged with the responsibility of collection and is being notified of the rejection.

Respectfully,

Commissioner

1 cc Collector, Los Angeles, Calif.
1 cc I.R.A. in Chg., Los Angeles, Calif.
1 cc Accounts and Collections Unit.
1 cc Records Division.
2 cc Clearing Division, Comp. Subsec.
ORM:NM

[Endorsed]: Filed Feb. 6, 1947. Edmund L. Smith,
Clerk. [30]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, acting through their respective attorneys, that the Stipulation of Facts filed herein on February 6, 1947, be amended by striking therefrom paragraph XVIII of the above Stipulation of Facts.

Dated: This 10th day of February, 1947.

LATHAM & WATKINS

By Henry C. Diehl

Attorneys for Plaintiff

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States Attorneys

EUGENE HARPOLE and

LOREN P. OAKES

Special Attorneys, Bureau of
Internal Revenue

By Eugene Harpole

Attorneys for Defendant

It Is So Ordered this 11 day of February, 1947.

JACOB WEINBERGER

District Judge

[Endorsed]: Filed Feb. 11, 1947. Edmund L. Smith,
Clerk. [31]

[Title of District Court and Cause]

OPINION

The jurisdiction of this court is invoked pursuant to Section 24 (20) of the Judicial Code as amended (28 USCA Sec. 41 (20)) for the recovery of Federal income taxes which plaintiff alleges were erroneously and illegally collected from him for the calendar year 1925 together with interest in the total amount of \$3,159.27.

Stipulations of facts were entered into between the parties; the case was tried on such stipulations and the testimony of the plaintiff. Briefs have been filed, and the case submitted for decision. We are indebted to counsel for their industrious presentation of the points of law involved herein. Our independent research has disclosed no authority of importance other than that included in their exhaustive briefs and written argument.

The uncontroverted and pertinent facts, as disclosed by the stipulations, exhibits attached thereto, and testimony are as follows:

The taxes herein involved are conceded by the parties to have been properly assessed. [32]

As of November 4, 1929, the balance due was the sum of \$3,472.06. After notice and demand the Collector issued a warrant of distraint on December 17, 1929, and filed a notice of lien on December 19, 1929.

From December 31, 1929 to August 15, 1933, plaintiff made payments in sums varying between \$75.00 and \$250.00, totalling \$2216.88. The balance of \$1255.18, plus interest, is the amount in controversy.

On August 1, 1932, plaintiff executed an "Offer in Compromise" on Treasury Department form 656, and

this offer was filed with the Collector of Internal Revenue at Los Angeles, California, on August 15, 1932. Such printed form included a waiver of the benefit of any statute of limitations affecting the collection of the liability sought to be compromised and consented to the extension of any statute of limitations affecting the collection of the liability by the period of time (not to exceed two years) elapsed between the date of filing said offer and the date on which final action should be taken thereon. Attached to said offer was a letter from the taxpayer to which we shall hereinafter refer, a financial statement of the taxpayer, and the Collector's Recommendation.

The waiver was filed at the request of the Collector of Internal Revenue, and was accepted in writing by the Commissioner; the offer was rejected on October 18, 1932.

On July 5, 1933, plaintiff executed a tax collection waiver wherein the taxpayer agreed that the tax might be collected by distraint or by a proceeding in court "begun at any time." Such waiver was filed at the [33] request of the Collector of Internal Revenue and was accepted in writing by the Commissioner; it was not filed in connection with any offer of compromise, and no compromise offer was pending on July 5, 1933. We shall hereinafter refer to this waiver as the second or unlimited waiver.

On May 6, 1936, plaintiff executed an "Offer in Compromise" on Treasury Department Form 656, and this offer was filed with the Collector of Internal Revenue at Los Angeles, California, on May 21, 1936. Such printed form included a waiver of the benefit of any statute of limitations affecting the collection of the liability sought to be compromised and consented to the suspension of the running of the statutory period of limitations on

collection for the period during which the offer might be pending and for one year thereafter. Attached to said offer was a financial statement signed by the taxpayer under oath. The waiver, to which we shall hereinafter refer as the third or limited waiver, was filed at the request of the Collector of Internal Revenue, and was accepted in writing by the Commissioner. The offer was rejected August 9, 1938.

At the time the last mentioned offer was forwarded to the Commissioner by the Collector, the latter attached to it a copy of the second or unlimited waiver hereinbefore mentioned.

Subsequent to August 9, 1938, no offer in compromise from the plaintiff was pending or under consideration by the Bureau of Internal Revenue, and from that date until October 9, 1945, plaintiff had no correspondence or conferences with the government concerning the tax [34] involved herein, and to plaintiff's knowledge no attempts were made during said period to collect said tax.

On October 9, 1945, the Collector made demand upon the plaintiff for payment of the tax liability involved herein, and on November 14, 1945, taxpayer paid said liability, together with a fee of fifty cents for the release of the lien created as heretofore mentioned.

A claim for refund of the amount paid was filed, and after more than six months during which no action was taken by the Collector with respect to said claim, this action was brought.

The parties have agreed that the only issue before the court is whether the collection of the tax was barred by the statute of limitations, and that the answer to this question depends upon the effect of the second and third waivers given by the taxpayer.

Plaintiff points out in his opening brief that if no waivers had been executed, collection of the tax would have been barred six years after assessment, or on October 19, 1935; that the first waiver extended this period for two months and three days, or until December 22, 1935; that if the second waiver had not been executed, collection would have been barred on December 22, 1935; that the third waiver, (assuming the second to have been effective until the filing of the third) extended the statutory period for collection by three years, two months and nineteen days, or until March 13, 1939; that in order for the defendant to prevail, the second waiver must be held to have been effective not only for the period from December 22, 1935 to May 21, 1936, but also from March 13, 1939 until November 14, 1945, the latter period amounting [35] to nearly seven years.

Plaintiff advances three reasons why the second or unlimited waiver was not in force at the time the tax was collected:

1. The said waiver was invalid from the start and the statute of limitations expired in 1935.
2. The said waiver was good only for a reasonable time, which had expired long before collection in 1945.
3. The third or limited waiver superseded the second or unlimited waiver and established a period of time which expired in 1939.

Plaintiff devotes little argument to his contention that the unlimited waiver was invalid from the beginning, his theory in this regard being that because Section 276 (c), 26 USCA, provides that the tax must be collected within six years after it is assessed or prior to the expiration of

any period for collection agreed upon, a definite period must be stated in a collection waiver, and that the language of the unlimited waiver involved herein did not come within the provisions of the statute. He cites as authority Bouvier's definition of "period" and also quotes the definition of the word as given by Funk and Wagnalls Practical Standard Dictionary.

Defendant replies to this contention with the statement that plaintiff has conceded that Section 276 (c), 26 USCA, applies only to taxable years beginning after December 31, 1938, and that the taxable year 1925 is governed by Section 278 (d) of the Revenue Act of 1924. Defendant further points out that at the time the waiver was executed, there was no statute in effect providing in [36] what manner, or for what period the statute of limitations for collection of taxes might be waived.

Defendant cites Cunningham Sheep & Land Co. (1927), 7 BTA 652, wherein the Board ruled:

(p. 655)

"The position of counsel is that the consent of September 1, 1923, is indefinite in time and is therefore of no effect under the Act, which, it is said by counsel, contemplated an intention that the consent should contain a statement of a 'particular period' during which the assessment might be made. In our opinion the Act does not have the effect of making void such consents as we are here considering. While a consent fixing a definite date for the expiration of the period in which assessment might be made may be desirable to remove uncertainty, there is nothing in the statute which requires that the expiration of the period be related to a definite date."

Plaintiff cites no reported case holding an unlimited waiver invalid because no definite period is fixed, and we find no portion of the statutes cited by either party in their respective briefs which we deem effective to make void the second or unlimited waiver we [37] are here considering.

We shall consider next plaintiff's contention that the third or limited waiver superseded the second or unlimited waiver and established a period of time which expired in 1939.

Plaintiff proposes a rule of construction, "It is a well settled principle of income tax law that doubts as to a waiver's effectiveness must be resolved against the government." In support, he cites two Board of Tax Appeals cases,—*D. J. Gay v. Commissioner*, 31 BTA 580 and *Union Shipbuilding Co. v. Commissioner*, 43 BTA 1143. Both of these cases deal with the authority of a person to execute a waiver on behalf of a dissolved corporation. Those cases, and the cases cited therein, offer no parallel to the matter before us and are of no assistance in determining the issues here raised.

Defendant argues against the principle offered by plaintiff, and cites *Clifton Mfg. Co. v. U. S.*, 3 FS 508, and *W. P. Brown & Sons Lumber Co. v. Commissioner*, 38 F. (2d) 425, as authority that statutes imposing limitations upon action by the United States are to be construed in favor of the government. This principle is enunciated in *E. I. DuPont de Nemours & Co. v. Davis*, 264 US 456, and in *U. S. v. Whited & Wheless, Ltd.*, 246 US 552, while in *United States v. Updike*, 281 US 489, we find the rule given "which requires taxing acts, including provisions of limitations embodied therein, to

be construed liberally in favor of the taxpayer." (P. 496.)

In *United States v. Havner*, 101 F. (2d) 161, Judge Sanborn of the Eighth Circuit observed, when discussing Section 276 (c), 26 USCA: [38]

(p. 165)

" . . . since there is no ambiguity in the language of the section with which we are concerned, there is no room for construction."

We find no ambiguity in the Section above mentioned, and see no necessity for construction.

Plaintiff calls attention to the fact that when the Commissioner accepted the third waiver, he had knowledge that the second, or unlimited waiver, was already on file. This may be assumed, because on Exhibit D-2, it is noted by the Collector that other waivers had been filed, and a copy of the second or unlimited waiver was attached to the offer in compromise which accompanied the second waiver in the Commissioner's file. Plaintiff argues that, when, notwithstanding his knowledge that there was an unlimited waiver on file, the Commissioner accepted the third, or limited, waiver, the Commissioner intended the third or limited waiver to supersede the second or unlimited waiver. Plaintiff cites *Atlantic Mills of Rhode Island v. U. S.*, 3 FS 699 (1933), with the statement that a waiver is not effective until signed by the Commissioner. This question is not before us, as all the waivers herein involved were signed by the Commissioner.

Plaintiff next cites *Helvering v. Ethel D. Co.*, 70 F. (2d) 761 (1934), a case decided by the Court of Appeals of the District of Columbia, upon a Petition of the Com-

missioner for review of a decision of the [39] Board of Tax Appeals. A deficiency had been determined against a corporation, but the tax had not been assessed, when an unlimited waiver was filed. The Board found as a fact that a second waiver was requested immediately upon receipt of the first, and the Board also found that both the taxpayer and the Commissioner intended that the second, or limited, waiver should abrogate the first or unlimited waiver. The Court in its opinion stated:

(p. 762)

"The point in the case is confined to the single issue whether the Board was correct in holding that the making and acceptance of the second waiver abrogated the first. The answer, as we think, depends upon the intention of the parties at the time of the event in question."

The Court then proceeded to review the evidence to ascertain if the same sustained the findings that the second waiver was requested immediately upon receipt of the first and was intended to be substituted for the first.

The Court agreed that the first mentioned finding was sustained by the evidence introduced regarding the dates of the waivers and the correspondence intervening between such dates.

In considering the evidence which justified the finding on intent, the Court stressed these facts:

The second, or limited, waiver was requested immediately after receipt of the first, and enclosed a form of waiver different than the first. [40]

The taxpayer executed the waiver, and at the same time called attention to the fact that it had already executed a different one.

The Court found:

(p. 763)

"The answer of the taxpayer is consistent with the finding of the Board that in signing the second waiver it acquiesced in the request of the Commissioner because it understood the first was not satisfactory and that the second was intended to replace it."

As further bearing upon the intention of the parties, the Court mentioned that a few months preceding the correspondence the Commissioner had by a departmental ruling limited all unlimited waivers then on file to a definite date and that thereafter it had been the practice of the Bureau in the request for waivers from taxpayers to limit the time of the waiver to the period of one year. Also, a new form of waiver was adopted and substituted for the old form. The unlimited waiver first signed by the taxpayer was on an old and obsolete form. In addition the Court stated:

(p. 763)

"There was doubt whether it was not terminable by the taxpayer on notice, and likewise doubt whether it would terminate without notice after a reasonable time, and it [41] referred to statutes some of which had been repealed. It may very well be, as the Board found, that these reasons impelled the request for the second waiver, and that they likewise indicate the purpose of the parties in executing it, and in this view we should have to affirm the Board's decision."

The Court continued:

"But in addition to what has just been said, it is fair to point out that, without regard to the motive

inducing the request for the second waiver, it is undeniable that, when it was returned by the taxpayer and received by the Commissioner, the first waiver had been received and filed. If the Commissioner was satisfied that it conformed to the requirements of the law and rules in relation to waivers and that it was effective to extend indefinitely the time of making the assessment, it was obvious that the second waiver added nothing to what the government already had. Notwithstanding this, the evidence shows the second waiver was accepted and agreed to by the Commissioner. [42] The Board has found as a fact that in this respect the Commissioner intended that it should be substituted for the unlimited waiver, and, since both waivers covered the same subject matter but were inconsistent with one another in relation to the time element, the rule with relation to agreements between the same parties concerning the same subject matter is applicable. In such circumstances, it has invariably been decided that the later rather than the earlier writing will be held to be the agreement between the parties on the subject."

.

(p. 764)

"Nor can there be any doubt of the inconsistency of the two waivers. The first was unlimited. The second required the government to make the assessment prior to the end of the calendar year in which it was executed. In such circumstances it has [43] been held that the provisions of the first clearly inconsistent with the provisions of the later one will be superseded, the inconsistent provisions of the first yielding to those of the second."

In the concluding paragraph of its opinion, the Court cited *Greylock Mills v. Commissioner*, 31 F. (2d) 655, 658, and observed that while it need not decide the question of whether a waiver would fall of itself after a reasonable time, it was admitted that the taxpayer should have the right to terminate such a waiver by notice.

(p. 764)

“ . . . we regard the case here as involving only a question of fact, which, in turn, has been definitely found by the Board against the Commissioner, and which we find there is evidence to sustain.”

Plaintiff also cites *Farmers Union State Exchange v. Commissioner*, 30 BTA 1051. There the statute began to run on June 16, 1919; on January 15, 1923, the taxpayer executed an unlimited waiver; then on June 9, 1924, the taxpayer executed a limited waiver. The Board announced the rule that “An unlimited waiver does not suspend the running of the statute forever, but only for a reasonable time or until the termination by either party upon reasonable notice.” The Board held that under the [44] circumstances, to hold that the first waiver was still in effect after the execution of the second waiver would be the equivalent of “brushing aside” the meaning of the second waiver. In addition, the Board pointed out that the execution of the second waiver, before the first had become effective, was sufficient to constitute a reasonable notice that the first waiver was terminated.

Plaintiff in his reply brief stresses the contention that if the government had no intention that the limited waiver should supersede the unlimited waiver its act of accepting the latter waiver was meaningless. Plaintiff cites *Stange v. U. S.*, 282 U. S. 270, and quotes Judge Brandeis' con-

cluding sentence in his opinion in this case—(p. 277)—
“It must be assumed that an effective and not a futile act
was intended.”

On the question of whether the limited or third waiver superseded the second or unlimited waiver, defendant Collector cites *U. S. v. Fischer* (1937), 93 F. (2d) 488, a decision of the Second Circuit reversing the District Court’s opinion reported at 16 F. S. 743.

In the *Fischer* case, according to the District Court’s opinion, the taxes involved were those for the years 1920 and 1921. March 12 and 15, 1926, assessments were made. March 28, 1926, the Collector made demand upon defendant for payment. In its opinion the District Court stated that March 12 and 15, 1932 were the last respective dates for the commencement of actions to collect said taxes. On January 16, 1932, defendant submitted an offer in compromise wherein he consented to the extension of the statute of limitations by the period of time not to exceed two years, elapsed between the filing [45] of the offer and the date on which the final action should be taken. The District Court stated:

(p. 744)

“The effect of this waiver was to interpose a suspension of the statute which on January 16, 1932 would have become operative after the lapse of 56 and 59 days, respectively and those periods were available to the government after action had been taken upon the compromise offer, if the legal situation was unaffected by other events.”

Continuing its summary of the facts, the District Court observed that on February 4, 1932, the taxpayer signed a waiver wherein it was agreed that one tax item might

be collected by distraint or by a proceeding begun at any time prior to December 31, 1933, and on February 5, 1932, a similar waiver was executed with reference to the remaining item. The District Court stated:

(p. 745)

“Standing alone, these papers would seem to limit the government’s right to bring suit to December 30, 1933.

“They must have been so construed by the Collector of Internal Revenue, for on September 15, 1933, he wrote to [46] secure additional waivers which would extend the time until December 31, 1934, but none were granted by the administrator.

“The question is whether these two last-mentioned waivers had any effect upon the government’s time to bring suit, which 17 days earlier had been enlarged (there being then 56 and 59 days remaining as has been said) by an indefinite period which would not exceed a duration of two years.

“It is interesting to consider why the waivers second in point of time were entered into at all. If they must be now disregarded as having had no necessary place in the relations between the government and the taxpayer, the infirmity was congenital. If that is true, why should the effort have been made to prolong the suspension of the statute by supplementing those waivers for an additional year, as was unsuccessfully attempted on September 15, 1933?

“It will be seen that the government had left less than [47] two months in which to institute suit, when the compromise offer and the waiver accompanying it of January 16, 1932, were filed. If that

offer had been declined by February 2, 1932, suit would have been necessary prior to April 1st of that year. But, by arranging on February 4th for an extension of almost 23 months, the government was sure of that period of time within which it could reject the compromise and bring suit as well. In other words, an indefinite period was exchanged for a definite period, which may have been advantageous to the government from the standpoint of administering the Income Tax Law."

The Circuit Court, in its opinion reversing the District Court mentioned that the lower court had come to the conclusion that the suit was barred, and stated:

(p. 489)

"We think that in so doing an erroneous conception of the effect of the first waiver was entertained. The defendant obtained consideration of his compromise offer by agreeing that the statute of limitations should be [48] extended as therein provided. This effectively tolled the statute for the period up to final action on the offer with a two year limitation. It was not a contract. *Aiken v. Burnet*, 282 U. S. 277, 51 S. Ct. 148, 75 L. Ed. 339. It was but a voluntary unilateral waiver of a defense. *Stange v. U. S.*, 282 U. S. 270, 276, 51 S. Ct. 145, 147, 75 L. Ed. 335. Nor were the subsequent waivers to December 31, 1933 contracts. The extension already in effect was, consequently, not reduced by additional unilateral waivers, since the government relinquished no rights by accepting them. As final action on the offer of compromise was not taken until after the fixed date of the additional waivers had passed, the

parties were simply left as they would have been had they not been executed at all.”

In *Atlantic Mills of Rhode Island v. United States*, 3 F. S. 699, cert. den. 291 U. S. 676, a case cited by plaintiff on a different point, we note the Court looked [49] to the language of a limited waiver to see whether or not by its terms it could be effective as a notice of termination of an unlimited waiver. The limited waiver was not accepted by the Commissioner, but taxpayer contended that, nevertheless, it operated as a notice. A portion of the opinion of the Court of Claims reads:

(p. 703)

“The document relied upon by plaintiff in support of these contentions, executed on February 9, 1923, is not susceptible of the construction that it was a notice to the Commissioner that the waivers theretofore duly executed and filed with the Commissioner and approved and signed by him February 9, 1923, would terminate on December 31, 1923.

“By its plain terms this document was clearly intended as a consent in writing by the taxpayer and the Commissioner with respect to 1917, and it was executed and filed with the Commissioner with that purpose in mind and with the view that it would be approved and signed by the Commissioner as a waiver contemplated by the statute rather than as a notice that the con- [50] sents theretofore filed and approved would terminate and become ineffective after December 31, 1923. The language of the document shows that it was intended as a waiver rather than as a notice”

There is nothing in the language of the third or limited waiver which could lead us to believe that it was intended as a notice of termination of the unlimited waiver. Nor are we required, if such were not the purpose of the third or limited waiver, "to brush aside the meaning of the later waiver" within the language of *Farmers Union State Exchange v. Commissioner*, 30 B. T. A. 1051; nor, are we required, if such were not the purpose of said waiver, to assume that by requesting such waiver, a futile act was intended to be accomplished. On the contrary, it is logical to assume that when the Commissioner requested the third waiver, he intended to secure a fixed period within which he might consider the compromise offer and investigate the financial status of the taxpayer, during which period, in the event the taxpayer filed notice of termination of the unlimited waiver, the Commissioner would not be left without a waiver.

We therefore hold that the second or unlimited waiver was not terminated by the giving of the third or limited waiver.

Plaintiff further maintains that a waiver which is not limited as to duration is valid only for a reasonable time, and calls attention to the fact that the elapsed [51] time from the date of filing of the second or unlimited waiver to the date of collection of the tax amounts to twelve years, four months and nine days during the last seven years, three months and five days of which time there were no proceedings of any sort had or pending between the plaintiff and the government; that more than a reasonable length of time had elapsed and the waiver was therefore no longer in effect at the time collection was made.

In support of such theory, plaintiff cites *Herman Frost v. Commissioner*, 23 B. T.A. 411, decided in 1931, and

Nathan Loeser v. Commissioner, 27 B. T. A. 601, decided in 1933.

In the Frost case, the member rendering the opinion [LBF 3/3/48] had stated that the Board ~~that~~ theretofore held that where a waiver was filed which provided for determination, assessment and collection irrespective of any period of limitations, the Commissioner had a reasonable time within which to act. (Citing: Cunningham Sheep & Land Co., 7 B. T. A. 652; Greylock Mills, 9 B. T. A. 1281, aff'd. 31 F. (2d) 655; William S. Doig, Inc., 13 B. T. A. 256; and Corn Products Refining Co., 22 B. T. A. 605.) It was further mentioned that a claim for abatement had been filed, and that a very confused state of affairs existed with reference to the liability of the parties concerned on account of the dissolution of the corporation. The deficiencies were assessed in January 1924, the waiver filed in 1924, and petitioner was advised of his liability in January 1927. The Board held that "in view of the record" the lapsed time was not unreasonable and that collection was not barred by the statute.

In the Nathan Loeser case (*supra*), the member who [52] rendered the opinion stated therein:

(p. 604)

"We have frequently held that an unlimited waiver permits the Commissioner a reasonable time in which to act. Cunningham Sheep & Land Co., 7 BTA 652; Greylock Mills, 9 BTA 1281; aff'd. 31 Fed. (2d) 655, Cert. den. 280 US 566; William S. Doig, Inc., 13 BTA 256; Herman Frost, 23 BTA 411.

"What is a reasonable time is not to be determined abstractly or solely by reference to the calendar. It

depends on all the circumambient facts of the situation. . . . In the instant case, judged solely by the calendar, a very considerable time elapsed between the signing of the waiver and the issuance of the notice of deficiency. But, viewed in the light of all the facts, each being related directly or indirectly to the other, we do not believe it can properly be said that respondent failed to act within a reasonable time . . . [53]

“The waiver in question was requested, executed and received only because of the controversy relating to the taxable status of the corporation. It specifically refers to the matter as did the forwarding letter. The action of both the petitioner and the corporation in filing claims for refund shows that they were continuously aware of the uncertainty of the outcome and sought to protect themselves by filing such claims. In order to avoid a multiplicity of proceedings the respondent refrained from taking action as to the 1920 tax until the identical issue should be decided by the Board. Under such circumstances, we are of the opinion that the respondent acted within a reasonable time.”

The Nathan Loeser case, as the Frost case, previously hereinabove mentioned, involved the determination of a liability. The waiver was dated September 25, 1925. The notice of deficiency was issued July 17, 1931.

It is interesting to note that both the Frost and the Loeser opinions include in their citations of [54] authorities on the point that an unlimited waiver permits the Commissioner a reasonable time to act, the case of Greylock Mills, 9 B. T. A. 1281, *aff'd.* 31 Fed. (2d) 655.

In *Cunningham Sheep & Land Company*, 7 B. T. A. 652, we find an expression of the reasoning upon which the Board based its "reasonable time" theory:

(p. 655)

"The courts are frequently confronted with contracts which fail to fix the period within which they are to be performed. Courts are reluctant to declare any contract void for uncertainty if the intent of the parties can be determined. In those cases where the uncertainty relates to the time of performance of the contract, the courts have found little difficulty in arriving at the conclusion that a reasonable time is to be allowed. There are some variations of this rule, one of which permits one of the parties in certain circumstances to give notice to the other of the time within which performance should be made, reasonable notice being given. It appears to us that the rules laid down by the courts for construction of such agreements are [55] properly to be applied to the consent entered into between the Commissioner and this taxpayer and that under the consent of September 1, 1923, the Commissioner was given a reasonable time after the date of its execution in which to determine and assess the deficiency."

The defendant Collector disagrees with plaintiff's contention that the waiver fell after the lapse of a reasonable time, and cites *Greylock Mills v. Commissioner*, (C. C. A. 2, 1929), 31 F. (2d) 655, Cert. Den. 280 U. S. 566.

The *Greylock* case concerned the statute of limitations with reference to the assessment of a deficiency and the Board of Tax Appeals held that the Commissioner acted

within [LBF 3/3/48]

~~with~~ a reasonable time after the execution of an unlimited waiver, a period of three years having elapsed.

The Circuit Court affirmed the Board of Tax Appeals decision, (31 F. (2d) 655), stating that it might rest its affirmance upon the same ground as that of the Board, that the Commissioner acted within a reasonable time. At page 658:

“But there is also another ground equally fatal to appellant’s contention. If waivers which are in terms unlimited are to be limited at all, we think they should expire only after the taxpayer gives notice to [56] the Commissioner that he will regard the waiver as at an end after a reasonable time, say three or four months, from the date of such notice. In such a rule there is no harshness to either party; on the contrary, it seems to us the most reasonable one. An analogy may perhaps be found in the case of contracts for the sale of land, where time does not ordinarily become of the essence unless expressly so stated, until notice is given by one party and an opportunity afforded to the other to act. (citing cases.) In the instant case, no such notice was given to the Commissioner, and we think the waiver remained outstanding so that he was entitled to act at his leisure.”

In *Greylock Mills v. White*, 63 F. (2d) 866, the First Circuit in its opinion at page 868 stated:

“The waiver in this case, being unlimited in duration extended the period for the assessment and collection of the 1918 tax at least a reasonable time beyond the then statutory limit of June 15, 1924.

(citing cases.) Whether it [57] continued the period indefinitely until either the taxpayer or the commissioner gave notice of the termination of the waiver, it is not necessary to decide, although it might be so terminated at any time on reasonable notice given by either."

At page 868, the First Circuit commented upon the opinion of the Second Circuit heretofore mentioned and reported at 32 F. (2d) 655:

"The Circuit Court of Appeals held that the waiver in this case was effective in extending the time for both assessment and collection of the 1918 tax beyond the limitation fixed in the prior statutes, and expressed the opinion that it extended the time for collection of a tax assessed prior to the date of its execution and until the taxpayer gave notice of a termination of the waiver. On the last proposition we express no opinion."

Defendant Collector also cites *Big Four Oil & Gas Co. v. Heiner*, 57 F. (2d) 29 (1932), a decision of the Third Circuit Court of Appeals, wherein there was a delay of four and a half years between assessment and collection of deficiency income tax because of taxpayer's claim for [58] credit. The Court stated:

(p. 30)

"The only question, therefore, to be decided is whether or not the unlimited waiver filed March 2, 1923, authorized the collection by distraint in November, 1928 of the tax assessed on March 15, 1924.

"If such a waiver does require the Commissioner to act within a reasonable time, the evidence was

sufficient to allow the court below to say that the period between the assessment, March 15, 1924, and the collection of the deficiency, November 8, 1928, was not unreasonable, because shortly after the assessment the appellant filed a claim for credit which was duly considered and rejected prior to June 24, 1927, when the second notice and demand were issued. . . . The delay in collecting the tax must have been caused by the time required to consider the appellant's claim for credit. It cannot object to a delay that it caused."

The Circuit Court then cited the case of *Greylock Mills v. Lucas*, 31 F. (2d) 655, and quoted from [59] the portion of the opinion in that case wherein it was held that an unlimited waiver remains outstanding until notice is given of its termination. After such quotation, the Court in the *Big Four Oil & Gas Co. v. Heiner* case said:

(p. 31)

"This rule seems reasonable and the present case falls within its scope."

In *Warner Sugar Refining Company*, 4 B. T. A. 5, the Board considered an unlimited waiver, stating:

(p. 11)

"No notice was ever served upon the Commissioner by the taxpayer prior to the assessment of the amount here in controversy as to when it would regard the provisions of the waiver as having been fully complied with by both parties and become inoperative."

In *F. L. Bateman v. Commissioner*, 34 B. T. A. 351, the Board held:

(p. 358)

“Under all the facts and circumstances here present, the delay in mailing the notice of deficiency, about $4\frac{1}{4}$ years after the expiration of the statutory period for assessment had expired, is not so unreasonable as to invalidate the waiver for [60] 1920.

“Furthermore, it has been held that waivers unlimited as to time expire only upon reasonable notice to that effect given by the taxpayer. (Citing *Greylock Mills v. Commissioner*, 31 F. (2d) 655.) No notice was given here.”

Defendant directs attention to the fact that in none of the Board of Tax Appeals cases cited by plaintiff did the Board conclude the Commissioner had failed to act within a reasonable time, and that therefore it was not, in any of the cases cited, necessary for the Board to pass upon the question whether an unlimited waiver survived beyond a reasonable time and until notice of its revocation was given by the taxpayer. In view of our conclusions hereinafter expressed we, also, find it unnecessary to pass upon that portion of plaintiff's contentions.

The plaintiff points out in his brief that there elapsed a period of seven years between the rejection of the last offer in compromise and the collection of the tax on November 14, 1945 [LBF 3/3/48]

vember 14, 1943:

“Thus for a period of more than seven years the government chose to remain inactive regarding the collection of these taxes . . . this period of in-

activity is so patently unreasonable that the court should, as a matter of law find that the government failed to act within [61] a reasonable time."

We note that in the letter from the taxpayer which accompanied the first offer in compromise disclosed that the taxpayer held a position, the salary for which, even after successive cuts, amounted to at least \$720.00 a month. In the letter the taxpayer stated that his position was the result of contacts made with his employers before his financial troubles multiplied, and he indicated that were his financial status known his employment would be shortly terminated; he detailed his expenses, and presented the sad picture of a man, formerly affluent, who had been caught in the crash, who had been forced to borrow on his insurance to support his family; that his insurance would shortly be in default, and he had been pronounced uninsurable. His financial statement showed an excess of liabilities over assets of the sum of \$32,-482.73. It was a year after writing this letter, and after he had been informed that the Collector would not accept his offer in compromise, and that he should promptly take up the matter of his liability with the Collector, that the taxpayer executed the second, or unlimited waiver.

We note also that in the offer of compromise filed in 1936, the taxpayer stated he had been without regular income and that he had subsisted largely upon borrowed money; he offered \$100.00 in compromise of his liability, and stated he had been obliged to borrow that sum; his financial statement showed liabilities in excess of assets in the sum of \$28,698.35.

Again, on August 9, 1938, the government rejected his offer in compromise, and again suggested that he

promptly take up the matter of his liability with the [62] Collector of Internal Revenue at Los Angeles.

In *Nathan Loesner v. Commissioner*, 27 B. T. A. 601, cited by plaintiff, it is stated that what constitutes a reasonable time is not to be determined abstractly or solely by reference to the calendar; that it should be viewed in the light of all the facts of the situation. In each of the cases cited by counsel wherein it is considered whether the elapsed time is reasonable, the facts and circumstances are different. None of the cases to which our attention has been directed provide us with a measuring stick for "reasonable time" in the matter before us, because, in most if not all of those cases, the period considered was one during which the Commissioner had failed to assess, or to finally determine after a controversy, the amount owed by the taxpayer. Here the amount had been determined; that it was due had been conceded by the taxpayer. There was no failure of the government to act which was occasioning the taxpayer anxiety, inconvenience, or uncertainty.

We believe that in determining what constitutes a reasonable time in cases such as this, the court should consider not only the facts and circumstances present in each case, but also the objects of statutes of limitations in connection with such particular facts and circumstances.

In *Bell v. Morrison*, 26 U. S. 350, Justice Story commented:

(pp. 360-361)

" . . . It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to [63] afford

security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those perjuries which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. . . . The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost."

The unlimited waiver provided clearly that the tax might be collected "at any time." There is no doubt that the taxpayer gave such waiver in the hope that the government might refrain from drastic collection procedure which would imperil taxpayer's means of livelihood, and that the taxpayer might be given grace to enable him to pay his debt without the necessity of such procedure.

" . . . definite unambiguous statements in written waivers, [64] made for the purpose of obtaining action favorable to the maker and on which such action is obtained, must be given effect." (S. S.

[LBF 3/3/48] 93

Pierce Co. v. U. S., 935 F. (2d) 599, at 601.)

We assume that the taxpayer, when he gave the unlimited waiver, intended to pay the debt to the government which he conceded to be due. That the government withheld action, over a long period, and made final de-

mand at a time when taxpayer was able to discharge his just liability, should not be deemed unreasonable. As was said in *Shambaugh v. Scofield*, 132 F. (2d) 345,—(p. 347): “Having had full advantage of the waivers, the taxpayers should not now be heard to repudiate them unless they were clearly inoperative.”

For the reasons herein stated, we conclude that at the time of collection of the tax, the second or unlimited waiver was operative.

Dated this 26th day of February, 1948.

JACOB WEINBERGER

United States District Judge

[Endorsed]: Filed Feb. 26, 1948. Edmund L. Smith, Clerk. [65]

[Minutes: Wednesday, March 3, 1948]

Present: The Honorable Jacob Weinberger, District Judge.

It appearing that through inadvertence the opinion filed herein on Feb. 26 1948, contains several typographical errors, it is ordered that said opinion be corrected by the clerk by interlineation as follows: page 21—6th word of line 15 the word “that” should be changed to “had”. Page 25—line 19: the word “with” should be changed to “within”. Page 30—line 24: the figures “1943” should be changed to “1945”. Page 34—line 7: the figures “935” should be changed to “93”. [66]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on February 6, 1947, before the above entitled Court sitting without aid or intervention of a jury; the plaintiff appearing by Latham and Watkins by Henry C. Diehl, Esq., and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California; George M. Bryant, Assistant United States Attorney for said District, and Loren P. Oakes, Special Attorney, Bureau of Internal Revenue; and the trial having proceeded and a Stipulation of Facts by the parties hereto having been [67] submitted, and oral evidence on behalf of plaintiff also having been submitted to the Court for consideration and decision, and the Court on the 26th day of February, 1948, having rendered its opinion herein, and the Court from the foregoing Stipulation of Facts and oral evidence, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

This action involves an alleged overpayment of Federal income taxes for the calendar year 1925.

2.

The defendant is and has been since prior to November 14, 1945, the duly appointed and acting Collector of Internal Revenue of the United States for the Sixth District of California, and plaintiff is an individual residing within said District.

3.

On or about October 19, 1929, there was assessed against the plaintiff income taxes for the year 1925; certain overassessments for other years were credited against the amount assessed, leaving a balance due of \$3,723.06. Notice and demand were issued on November 4, 1929 and on November 18, 1929; on December 17, 1929, a warrant of distraint was issued with respect to such liability, and on December 19, 1929, notice of lien was filed with the County Recorder of Los Angeles County, California.

4.

Plaintiff made payments from time to time in [68] amounts varying between \$75.00 and \$250.00 on said outstanding balance, until on August 15, 1933, at which time the balance due on said tax was the sum of \$1,255.18, with interest thereon.

5.

On August 1, 1932, plaintiff executed an "Offer in Compromise" on Treasury Department Form 656, a printed form including a waiver with respect to the statute of limitations, which waiver provided that the taxpayer waived the benefit of any statute of limitations affecting the collection of the liability sought to be compromised and in the event of the rejection of the offer expressly consented to the extension of any statute of limitations affecting the liability sought to be compromised by the period of time, not exceeding two years elapsed between the date of the filing of the offer and the date on which final action thereon should be taken. The offer and waiver were executed at the request of the Collector of Internal Revenue, and were filed with the Collector of Internal Revenue at Los Angeles, California, on August 15, 1932.

6.

Plaintiff attached to said "Offer in Compromise" his letter dated July 20, 1932, addressed to the Commissioner of Internal Revenue, wherein the taxpayer enclosed a financial statement which showed liabilities in amount of \$32,482.73 in excess of his assets, and wherein he indicated that should his financial status become known to his employer he would lose his position.

7.

On August 25, 1932, the Commissioner of Internal Revenue accepted in writing said Waiver of Statute of [69] Limitations, and on October 18, 1932, said Commissioner rejected the "Offer in Compromise."

8.

On July 5, 1933, at the request of the Collector of Internal Revenue, the taxpayer executed a "Tax Collection Waiver," wherein it was agreed between the Commissioner of Internal Revenue and the Taxpayer that the amount of \$3,472.06 representing an assessment of income tax for the year 1925 might be collected, together with interest, from the taxpayer by distraint or by a proceeding in court begun at any time.

9.

At the time the waiver last above mentioned was executed no offer in compromise was pending, and the waiver was not submitted in connection with any offer in compromise. Said waiver was accepted in writing by the Commissioner on March 5, 1934.

10.

On May 6, 1936, plaintiff executed an "Offer in Compromise" on Treasury Department Form 656, a printed

form including a waiver with respect to the statute of limitations, which waiver provided that the taxpayer waived the benefit of any statute of limitations affecting the collection of the liability sought to be compromised, and agreed to the suspension of the running of the statutory period of limitations on assessment or collection for the period during which the offer should be pending and for one year thereafter. By said "Offer in Compromise" the taxpayer tendered the sum of One Hundred Dollars in [70] settlement of the balance then due, and stated in said offer that the taxpayer had been without regular income for several years and had subsisted largely upon borrowed money. With said offer, the taxpayer included a financial statement which showed his liabilities in the amount of \$28,698.35 in excess of assets. Said offer and waiver were executed at the request of the Collector of Internal Revenue, and were filed with the Collector of Internal Revenue at Los Angeles, California, on May 21, 1936. The Collector of Internal Revenue at Los Angeles transmitted said offer and waiver to the Commissioner of Internal Revenue, therewith forwarding a copy of the Tax Collection Waiver filed July 5, 1933.

12.

The waiver executed May 6, 1936 was accepted by the Commissioner of Internal Revenue in writing on May 29, 1936, and on August 9, 1938, said last mentioned "Offer in Compromise" was rejected by said Commissioner.

13.

Subsequent to said date of August 9, 1938, no offer in compromise from the plaintiff was pending or under

consideration by the Bureau of Internal Revenue, and subsequent to said last mentioned date and until October 9, 1945, plaintiff had no correspondence or conferences with the Government concerning the taxes herein involved, and to plaintiff's knowledge no attempts were made during said period to collect said taxes.

14.

On October 9, 1945, the Collector of Internal Revenue made demand upon plaintiff for the payment of the [71] balance due on said taxes, and on November 14, 1945, plaintiff paid said balance of \$1,255.18 together with interest amounting to \$1,904.09, together with the sum of fifty cents for the release of the lien created as hereinbefore mentioned. A claim for refund for the amount of said tax and interest so paid was filed by the plaintiff, and after more than six months during which said claim for refund was neither accepted nor rejected, this action was brought.

15.

No notice with respect to revoking the Tax Collection Waiver executed July 5, 1933 was given by plaintiff.

16.

Under all the circumstances herein shown no unreasonable time elapsed prior to the date when the Government collected the taxes herein involved from the plaintiff.

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1.

The Tax Collection Waiver executed by plaintiff on July 5, 1933 was valid.

2.

Said Tax Collection Waiver of July 5, 1933 was not revoked or terminated by the execution and acceptance of the waiver of May 6, 1936. [72]

3.

Said Tax Collection Waiver of July 5, 1933 was not revoked or terminated by the lapse of time herein.

4.

Said Tax Collection Waiver of July 5, 1933 was operative at the time said taxes were collected.

5.

The collection of said taxes was not barred by any statute of limitations.

6.

Plaintiff has not overpaid the taxes and interest involved herein and is entitled to no relief by his said complaint.

7.

Defendant is entitled to judgment herein with costs.

Dated this 23 day of April, 1948.

JACOB WEINBERGER

United States District Judge

[Endorsed]: Filed Apr. 23, 1948. Edmund L. Smith,
Clerk. [73]

In the District Court of the United States
Southern District of California
Central Division
No. 5517-W

E. C. SIMMONS,

Plaintiff,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,
Defendant.

JUDGMENT

The above case came on regularly for trial on February 6, 1947, before the above entitled Court sitting without aid or intervention of a jury the plaintiff appearing by Latham and Watkins by Henry C. Diehl, Esq., and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California; George M. Bryant, Assistant United States Attorney for said District, and Loren P. Oakes, Special Attorney, Bureau of Internal Revenue; and the trial having proceeded and a Stipulation of Facts by the parties hereto having been submitted, and oral evidence on behalf of plaintiff also having been submitted to the Court for consideration and decision, and the Court after being fully advised in the premises and after due deliberation, having rendered its Opinion herein on February 26, 1948, and having filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered in favor of the defendant in accordance with said Findings and Conclusions; [74]

Now, Therefore, by virtue of the law and by reason of the Findings and other matters aforesaid, it is considered and ordered by the Court that the above entitled action be dismissed and that defendant have judgment for and shall

recover from plaintiff the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of \$10.00.

Judgment rendered this 26 day of March, 1948.

JACOB WEINBERGER

United States District Judge

Judgment entered Apr. 26, 1948. Docketed Apr. 26, 1948. Book 50, page 403. Edmund L. Smith, Clerk; by L. B. Figg, Deputy.

Judgment Satisfied 5-18-1948 by flg. satis. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Wm. A. White, Deputy. [75]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 26, 1948. Edmund L. Smith, Clerk. [76]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that E. C. Simmons, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 26, 1948.

LATHAM & WATKINS

By Henry C. Diehl

June 21, 1948. [77]

* * * * *

Received copy of the within Notice of Appeal and Appellant's Designation of Record on Appeal this 21 day of June, 1948. James M. Carter, U. S. Atty., by Gertrude M. Johnson, Attorney for Deft.

[Endorsed]: Filed Jun. 21, 1948. Edmund L. Smith, Clerk. [80]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 81, inclusive, contain full, true and correct copies of Complaint for Refund of Income Taxes Paid; Answer; Stipulation of Facts; Stipulation and Order Amending Stipulation of Facts; Opinion; Minute Order Entered March 3, 1948; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Appellant's and Appellee's Designations of Contents of Record on Appeal which, together with copy of Reporter's Transcript of proceedings on February 6, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Jacob Weinberger, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 6, 1947, Los Angeles, California

Appearances:

For the Plaintiff: Latham & Watkins by Henry C. Diehl, Esq., 1112 Title Guarantee Building, Los Angeles, California.

For the Defendant: Loren Oakes, Special Attorney, Bureau of Internal Revenue; and George M. Bryant, Assistant United States Attorney.

Los Angeles, California, February 6, 1947,
2:00 O'clock P. M.

(Case called by clerk.)

Mr. Diehl: The plaintiff is ready.

Mr. Oakes: The defendant is ready.

Mr. Diehl: If the court please, I think it is advisable that I make a brief opening statement to apprise you of the nature of the action. This case involves the alleged overpayment of 1925 income taxes. The facts are, mostly, undisputed, I believe.

In October, 1929, the tax was duly assessed. There is no argument about that. Thereafter came the crash or that was about the time of the crash, and the plaintiff was unable to pay the amount in full and he made part payments through the years until, in 1935, the amount was reduced to the amount involved in this suit.

On October 15, 1932, the plaintiff filed an offer in compromise, incorporated in which was a waiver of the

statute of limitations for the time which the government would take to consider the offer in compromise.

On October 18, 1932, this offer in compromise was rejected.

Thereafter, on July 5, 1933, the plaintiff executed what is entitled a tax collection waiver, which purports to extend the statute of limitations indefinitely. [2*]

On March 15, 1934, this waiver was executed by the Commissioner.

On May 21, 1936, a second offer in compromise was filed by the taxpayer. This offer also contained a waiver of the statute of limitations for the period during which the offer was pending and for one year thereafter. On August 9, 1938, this was rejected by the Commissioner.

Thereafter, nothing transpired between this taxpayer and the government until October of 1945, when the notice and demand for payment of the tax was presented to the plaintiff. On November 14th, 1945, he paid the tax and, on December 11th, he filed a claim for refund. And, after waiting the six months' period, during which no action was taken, on June 27, 1946, this action was filed.

The only issue is whether or not the collection of tax was barred by the statute of limitations. The plaintiff says it was and the defendant says it was not, and relies upon the collection waiver of July, 1933, which purported to suspend the statute of limitations indefinitely, the so-called unlimited waiver.

Our theory of the case is, one, that an unlimited waiver is good for only a reasonable length of time, in any event, and that the time that has elapsed is much more than a reasonable length of time; two, that that waiver,

*Page number appearing in original Reporter's Transcript.

contained in the second offer in compromise, filed after the so-called unlimited [3] waiver, superseded the so-called unlimited waiver, and the government is bound by the time mentioned in this second offer in compromise.

The Court: Will you repeat that last statement?

Mr. Diehl: That the waiver contained in the second offer in compromise, which was filed in 1936, supersedes the so-called unlimited waiver filed in 1933 and sets a definite time limit in this case, March 13, 1939.

The Court: Is that the one that provides for a year?

Mr. Diehl: Yes; that is, for the period during which the offer was being considered, plus one year. That would bar the taxes as of March 13, 1939. Of course, they were not collected until some six and a half years later.

We have an additional argument, which has apparently never been considered in any court, and that is that an unlimited waiver is not valid in any event for the reason that the taxes shall be collected within six years after assessment or within such period as is agreed upon, in writing, by the Commissioner and the taxpayer. And our argument will be that the word "period" means a definite period and not an unlimited period.

Now, as I say, the facts are, mostly, undisputed. The pleadings contain allegations of fact which are admitted. In addition to that, we have signed a stipulation of facts which contains practically all of the rest of the facts necessary to [4] the case, and I would like to submit the stipulation at this time, duly signed by counsel for both sides.

As far as the plaintiff is concerned, we would like to introduce about 15 minutes of oral testimony by the plaintiff, and that will be our case.

The Court: Isn't that testimony covered in your stipulation of facts?

Mr. Diehl: No; it is not. These are facts which were not such that the government chose to stipulate to them. I don't know whether they will be controverted or not.

Mr. Oakes: If your Honor please, I would like to mention that the statement which has been made by Mr. Diehl represents a pretty good summary of the matters which have gone into this statement of facts. We have tried to make the stipulation run, for the sake of simplicity, in chronological order.

It is true there was an offer made in 1932. This offer, of course, was rejected during that same year and, hence, I don't believe either party hereto or the court will find that that 1932 offer is of any particular relevancy.

However, when we come into the next year, 1933, the taxpayer did execute a waiver, which is attached to the stipulation as Exhibit C, and by its precise terms, it is notice to the government to make an assessment or, rather, to make collection, at any time. The assessment had already been made in [5] 1929, so this waiver was given so that the collection could be made at any time. Now, had that offer not been given in 1933, the time would have expired by the applicable periods of limitation. So the purpose of the waiver was so that the government wouldn't have to harass the taxpayer and he has more time, and, if his financial circumstances change in due course, his tax liability would be ultimately paid off and the Commissioner doesn't have to resort to his drastic remedies of collection, distraint, and so forth. This 1933 unlimited waiver, on which we rely, was signed by the Commissioner in 1934.

The Court: Did that waiver precede the other waiver or follow it?

Mr. Oakes: This particular waiver, then, is sandwiched in between the 1932 offer of compromise and the 1936 offer in compromise.

The Court: And the 1936 offer in compromise limited the consideration within a year after the acceptance or rejection of the offer?

Mr. Oakes: The 1936 offer in compromise was made on a printed form and one of the standard clauses which appeared in print was that the statute of limitations should not run while the offer was under consideration and for one year thereafter.

The Court: And that was rejected?

Mr. Oakes: That was rejected [6]

The Court: You are relying, then, on the unlimited waiver?

Mr. Oakes: Which preceded it in 1933.

The Court: What is your contention as to that waiver?

Mr. Diehl: When we say that the offer of compromise was rejected, we mean the offer in compromise; not the waiver. It is shown on the form there that the waiver was accepted by the Commissioner. In other words, the Commissioner accepts the waiver when the offer in compromise is filed. Then, he later rejected the offer in compromise. But that doesn't mean he rejected the waiver.

Mr. Oakes: As Mr. Diehl says, there is a sentence on the 1936 offer whereby, as an administrative matter, the Commissioner states that he will accept the waiver above set forth and will consider the offer in due course.

Now, on this standard form 656, which was used both in 1932 and also in 1936, the reverse side provides for the Collector reporting to the Commissioner as to the

status of this account and the receipt of this offer, which the Collector must transmit to the commissioner in Washington, D. C. In transmitting this 1936 offer to the Commissioner in Washington, D. C., the Collector is required to report whether there are any waivers on file. By that is meant, obviously, a waiver other than the waiver set forth on the face of the offer. So that the Collector reported to the Commissioner, in 1936 [7] "Here is a 1936 offer in compromise. We forward it to you. We also have a waiver on file." And he forwarded a copy of this unlimited waiver which was executed three years before.

I mention this because the cases lay considerable stress upon the intention of the parties, and at least the intention of the Collector, as the representative of the government, was that in forwarding this 1936 offer the situation was protected by an unlimited waiver which was obtained in 1933, a copy of which was attached to the 1936 offer.

I realize that opposing counsel will advance legal arguments that there might have been a superseding waiver. That is a point which we wish to prove in due course before your Honor.

The Court: This payment was finally made when?

Mr. Oakes: It wasn't made until 1945, and at that time we went out and made a notice and demand and, pursuant to that notice, the taxpayer paid in 1945 what he, obviously couldn't pay in earlier years when he was reporting that he was \$28,000 in the red.

The Court: That waiver that you rely upon was executed when?

Mr. Oakes: In 1933.

The Court: Some 12 years before this?

Mr. Oakes: That is correct.

• The Court: Followed by another waiver and followed by [8] an offer of compromise and an extension of the limitation period at that time?

Mr. Oakes: I think it is worthy of note that this 1933 waiver was given at a time when there wasn't any offer in compromise pending whatsoever. So its purpose was to maintain the status quo. In 1936 that document, according to the government's position, was for the purpose of submitting an offer in compromise and, as an incidental, it did have language suspending the running of the statute of limitations. We think, under the authorities, the government was entitled to the specific revocation of an unlimited waiver and, had there been any such notice, as a matter of practicality, the Commissioner would have protected himself before the expiration of the limitation period.

The Court: Are there any questions arising in relation to such a payment? Of course, it is not an overpayment—

Mr. Oakes: I believe the taxpayer would say it is an overpayment because it is outlawed or barred by the statute and, conversely, we say it isn't because it is not outlawed and not barred by the statute of limitations. The merits of that tax are not in dispute but rather the issue of the statute of limitations.

Mr. Diehl: If I may, I think the answer to your Honor's question is that the Internal Revenue Code defines a payment of taxes, after the statute has expired, as an overpayment on [9] which the taxpayer is entitled to a refund. So, if the statute has expired, it is an overpayment and, if the statute has not expired, it is not an overpayment.

Mr. Oakes: We believe that it would be an overpayment provided, of course, that the court should decide

adversely to the government on the issue of the statute of limitations.

The Court: Now you wish to proceed with the introduction of your testimony?

Mr. Diehl: Yes, sir.

Mr. Oakes: I have just one more remark to make.

The Court: Go ahead.

Mr. Oakes: I don't believe anyone representing the government has heretofore heard any expression of what I must say is a rather novel point by Mr. Diehl, that, because there was an indefinite period prescribed in the 1933 waiver, the 1933 waiver was thereby rendered void. It would be, certainly, diametrically opposed to the intention of the parties, when they have a waiver saying that an assessment can be made at any time, to apply an interpretation which would say it is no good, even for one minute, because it is not definite. The courts have had these unlimited waivers before them and they have been upheld. So the government, of course, is violently opposed to any such radical interpretation of the document as that.

The Court: I imagine you have authorities in connection [10] with your waivers.

Mr. Oakes: Opposing counsel intimated that that point hadn't been heretofore urged. It appears he is more ingenious than any of his predecessors.

The Court: Does a waiver of that kind resemble the waiver in some of these promissory note matters, that are unlimited?

Mr. Oakes: We haven't studied any such analogy but it is a point we would be glad to cover in briefs.

The Court: I don't know whether it is applicable here. You may proceed, then, with the introduction of your testimony.

Mr. Diehl: Mr. Simmons.

E. C. SIMMONS,

the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Diehl:

Q. State your name, please.

A. Edward C. Simmons.

Q. You are the plaintiff in this action?

A. I am.

Q. Mr. Simmons, I refer you to Exhibit A-1 attached to the stipulation which is on file herein, which purports to be an offer in compromise, dated July 20, 1932. Do you recall [11] the circumstances under which that offer in compromise was filed? A. I do.

Q. At whose request was that offer filed?

A. At the instance of the Internal Revenue Department.

The Court: Is that Exhibit 1?

Mr. Diehl: That is Exhibit A-1, your Honor.

Q. At the time you executed this offer in compromise, Exhibit A-1, did you know that it included a waiver of the statute of limitations, in definite terms?

A. I did.

Q. Now I refer you to Exhibit C attached to the stipulation, which is a so-called tax collection waiver, dated July 5, 1933. Do you recall the circumstances under which that waiver, Exhibit C, was executed and filed? A. Yes.

The Court: You have asked about A-1. Did you ask about A-3?

Mr. Diehl: I have skipped A-2, -3, -4 and B.

Q. At whose request was the collection waiver, Exhibit C, filed?

(Testimony of E. C. Simmons)

Mr. Oakes: To which the government objects. Here we have a document which speaks for itself. The two parties, the taxpayer and the government, have agreed to this, as indicated by their signatures, and whether the government requested the [12] taxpayer or whether the taxpayer requested the government can't have any legal effect whatsoever or any significance on this document. They arrived at that agreement and, under the parol evidence rule, there is no reason to modify it. And, particularly because of the immateriality and irrelevancy of that question, the government objects, and there is no ambiguity there to be explained.

Mr. Diehl: If the court please, the government did announce the possibility that intent may have a good deal to do with this case, and we believe these questions are material in arriving at that intent. Specifically, we believe it is important to show that the government asked for these waivers, in order to carry forward and show the intent of the taxpayer and the government in subsequent dealings. Moreover, we also have the rule of evidence, set forth by Rule 43(a), that the rules of evidence in the State where the court is sitting are to be recognized and evidence is to be admissible if there is any ground for it. And we think the rule in California that circumstances surrounding the execution of a written instrument make it admissible in evidence is applicable.

The Court: If there is any doubt as to the contents of the instrument.

Mr. Diehl: There is no doubt as to the contents of the instrument. We are merely getting at the surrounding circumstances and showing the intent of the parties in all their [13] dealings.

(Testimony of E. C. Simmons)

Mr. Oakes: For what purpose? How could there be any proof concerning circumstances unless there is something equivocal in this document that needs interpretation? If there were some other construction before the court, it might be necessary to enter into the surrounding circumstances to see. And I believe the document speaks for itself, and I don't believe there is anything to construe.

The Court: Your contention is that here is a document that was executed by the taxpayer and that the question of the intent has some place in the execution of this document?

Mr. Diehl: Not particularly in the execution of this document as particularly in the matter which follows. I believe, if this so-called unlimited waiver was executed at the request of the government and subsequently another document was executed at the request of the government, that that means the second document shall supersede the first.

The Court: Isn't that a question of law?

Mr. Diehl: Frankly, I think it is but the government seems to indicate the intent may have something to do with this. I am merely trying to anticipate some argument which the government will put on probably by briefs.

The Court: If there is some understanding between the parties when the document is executed as to whether they will replace it or supplant it with another document, then I think [14] the surrounding circumstances may be introduced, but here I don't know whether the question of intent has any bearing. The document was executed. And the man who executed it intends to use it, does he not?

Mr. Diehl: Yes, sir.

(Testimony of E. C. Simmons)

The Court: The same as a promissory note or a check. Otherwise, he wouldn't have executed the agreement. If this was executed with some intent that is not disclosed in the document—

Mr. Diehl: As to this particular document, you may be correct.

The Court: I don't know whether it is admissible or not to show intent, that is, intent standing alone and not connected with any other issue. I am inclined to believe that the document speaks for itself and the question of intent is immaterial. The objection is sustained.

Q. By Mr. Diehl: Now, Mr. Simmons, relative to Exhibit D-1 attached to the stipulation of facts, the exhibit immediately following Exhibit C, which we have been talking about—

A. Yes, sir.

Q. —that was an offer in compromise, dated April 23, 1936. Do you recall the circumstances surrounding the filing of this offer?

A. I do.

Q. At whose request was it filed? [15]

Mr. Oakes: The government wishes to make the same objection. We think the analogy here is like a contract. We think it is analogous to a contract because it is signed by the taxpayer and subsequently signed by the Commissioner.

The Court: Would it make any difference at whose request?

Mr. Oakes: That is not material, I don't think.

The Court: I don't see any harm in that question.

Mr. Oakes: I am also trying to anticipate as well as Mr. Diehl. I fear that the taxpayer is going to try and make capital out of whose request this was, and I believe the legal results are the same regardless of who requested it.

(Testimony of E. C. Simmons)

The Court: That is probably true.

Mr. Oakes: And, if that is so and being immaterial, I don't want the record cluttered with it.

The Court: I don't think there is any harm in stating at whose request it was done. He may answer that question.

A. At the instance of someone in the Internal Revenue Department.

Q. By Mr. Diehl: At the time that this so-called second offer in compromise, Exhibit D-1, was filed, did you recall the fact that you had already executed Exhibit C, the tax collection waiver?

A. I did, indeed, and I was firmly of the opinion—

Mr. Oakes: I believe the government should move to [16] strike all of his opinion and recollections.

The Court: It may be stricken.

Q. By Mr. Diehl: At the time the second offer in compromise, Exhibit D-1, was filed, did you know that the government had already on file a so-called unlimited waiver?

A. Yes, and I was firmly of the opinion—

Mr. Oakes: I move to strike, again, his opinion in that regard.

The Court: Just answer the question, and, if your counsel wants to ask you anything else, he will ask it and proper objection may be made then.

Q. By Mr. Diehl: Did you intend that the waiver contained in that second offer in compromise should supersede the previously executed tax waiver?

Mr. Oakes: The government objects because counsel is trying to insert in the record a mere subjective matter of the state of mind of the witness and we can't interpret

(Testimony of E. C. Simmons)

agreements by what was in his mind. And it was never communicated to the government. Therefore, it is immaterial.

The Court: The witness can't answer it. The matter of intent has no bearing on the subject, I don't think. I mean it is his state of mind.

Mr. Diehl: That is quite true. Of course, we believe that the intent is shown in the record.

The Court: Whatever the record shows— [17]

Mr. Diehl: As I say, I am merely anticipating that the government is going to make certain representations and we must show the actual intent of the parties aside from that. If they will stipulate that, I will be glad to withdraw my question.

The Court: If they do, it will have to be construed from the documents, I imagine, unless there is some evidence bearing on the subject.

Mr. Diehl: Then, I take it the objection is sustained, is it?

The Court: The objection is sustained.

Q. By Mr. Diehl: Do you know, Mr. Simmons, what the local Collector's recommendation was with respect to the second offer in compromise, Exhibit D-1?

A. I was informed it had gone forward to Washington with the recommendation that it be accepted.

Q. Now, with reference to Exhibit E, which is the letter from the Commissioner, dated August 9, 1938, rejecting the offer in compromise of April 23, 1936, Exhibit D-1, to the best of your recollection, did you have any correspondence or discussions with the Treasury Department on the subject of these taxes from that date until October of 1945?

A. No.

(Testimony of E. C. Simmons)

The Court: To which exhibit are you referring?

Mr. Diehl: Exhibit E, the last exhibit. [18]

Q. From the date of that letter until the month of October, 1945, were any attempts made to collect these taxes from you?

A. Not that I can recall.

Q. There were, then, no proceedings of any kind, so far as you recall, pending between you and the government from August, 1938, to October, 1945?

A. No, sir.

The Court: What do you mean by "proceedings"?

Mr. Diehl: Well, pending offers in compromise, correspondence or anything relating to these taxes, and no visits from the Collector in attempting to collect. In other words, the matter was completely at rest from August, 1938, to October, 1945.

The Court: Is there any dispute about that?

Mr. Diehl: The stipulation contains only the fact that there were no offers in compromise pending. I merely want to get into the record the fact that there was nothing pending.

Mr. Oakes: The government hereby objects to the question as immaterial. We had an unlimited waiver and we can proceed against the taxpayer whenever we see fit to do so.

The Court: I think he may answer if there was any correspondence took place or any conferences. It will be limited to those matters, correspondence or conferences with any department. [19]

Mr. Diehl: I believe he has answered the question but I will state it again to be sure.

(Testimony of E. C. Simmons)

Q. During the period of August 9, 1938, to October, 1945, did you have any correspondence with the government concerning your 1925 income tax?

A. No, sir.

Mr. Oakes: For the purpose of the record, the government wishes to repeat the same objection, that these conversations are immaterial under our rights under the unlimited waiver.

The Court: That is between what dates?

Mr. Diehl: Between August 9, 1938, and October— what was the date of that demand, Mr. Oakes? Do you know?

Mr. Oakes: I believe the stipulation says there was a demand in October, 1945. It is paragraph 16 of the stipulation.

Mr. Diehl: Yes, October 9, 1945.

Q. During that period, you had no discussions with any—

The Court: I will rule on that objection. There was an objection made.

Mr. Oakes: Yes, your Honor. I objected to that.

The Court: The objection is overruled.

Q. By Mr. Diehl: Were there any discussions between you and any representative of the government, during that period, regarding your 1925 tax? [20]

Mr. Oakes: The same objection.

A. Not that I can recall.

The Court: Overruled.

Mr. Bryant: Your Honor, the witness answered.

A. Not that I can recall.

(Testimony of E. C. Simmons)

Q. By Mr. Diehl: Were any attempts made to collect the 1925 tax during that period?

Mr. Oakes: The government objects to that as calling for a conclusion of the witness and it would involve matters not within his knowledge, and also the ground of immateriality.

The Court: When you talk about an attempt, that presupposes some act or something of that kind.

Mr. Diehl: I think it is probably covered by the other questions anyway, that he had no correspondence or conferences as far as he knew. I will withdraw that question. You may cross examine.

The Court: I think that question has been formerly asked, the first question; that it was asked when you referred to Exhibit E, and there was no objection at that time whether there was any attempt to collect,—

Mr. Diehl: I believe that is correct.

The Court: —if I am not mistaken.

Mr. Oakes: I don't recall, your Honor.

The Court: I have it in my notes here.

Mr. Oakes: That being the case, for the purpose of the [21] record, I would like to move to strike testimony with respect to attempts to collect on the ground it calls for the conclusion of the witness on matters that took place in government offices, unbeknownst to the taxpayer.

The Court: That motion may be granted. It seems to me that you gentlemen can stipulate, if between these dates there had been any correspondence or there had not been—you might include that in your stipulation, if there was any correspondence, on both sides, and that would simplify the situation from a legal standpoint.

Mr. Oakes: I am not able to state with certainty what actually transpired at that time and I would rather leave the court without anything on that phase.

The Court: Very well. The reason I mentioned that was to see whether it is possible to submit the entire matter on an agreed statement of facts.

Mr. Oakes: I want to confer just a moment, if I may. No cross examination.

Mr. Diehl: The plaintiff rests.

Mr. Oakes: For the purpose of the record, do I understand that the stipulation is now being received for consideration by your Honor?

The Court: I will look at it. Paragraph XVIII. "Either party hereto may at the time of trial or writing briefs herein or any other time question the relevancy and/or [22] materiality of any of the facts or exhibits herein stipulated. It is further agreed that this stipulation of facts shall not prejudice the right of either party hereto to introduce such other and additional evidence as is not inconsistent with or contrary to the facts herein stipulated."

What is your present attitude as to the relevancy or materiality of the facts or exhibits stipulated to under this stipulation?

Mr. Diehl: If the court please—

The Court: I don't want to be put in this position. I don't want to begin the consideration of a case and have someone, at the last moment, in his brief, object to the relevancy and upset perhaps my whole line of thinking on the solution of the case.

Mr. Diehl: Frankly, my feeling is that Exhibits A-1, -2, -3 and -4 and Exhibit B, are probably relevant except

to this extent: I will restrict that as far as A-2, -3, and -4 are relevant. Exhibit A-1 is relevant because it contains a waiver of the statute which it is necessary to use in computing when the collection became barred. Exhibit B is material because it shows the length of time during which this particular offer was being considered and is necessary to a computation of the extension. Exhibit C is, of course, quite material. It is the government's whole case. Exhibit D-1 is also very material because that is our case, or [23] a good part of it. Our claim is that Exhibit D-1 supersedes Exhibit C. D-2 is material, I take it, because of its reference to the preceding waiver. D-3 and D-4, I believe, are not material. D-5, I believe we will both agree, is material, we for one reason and the government for another. Exhibit E is also material in that it shows the length of time during which the offer was being considered. The facts stated in the stipulation—I believe there are some there which are not material and I don't believe they have any bearing on the case one way or the other and that they shouldn't upset anybody. They are just preliminary to what goes on here. The only argument in the case is was the collection barred by the statute of limitations. We admit the taxes were properly assessed.

Mr. Oakes: Your Honor, I believe it would be unwise to strike any paragraph or sentence from the stipulation and, likewise, inadvisable to strike any of these exhibits because they give the continuity and they give the chronological story of what happened, and it wouldn't give your Honor a clear picture of the history if anything were stricken. And as to these offers in compromise, we now give your Honor the picture. When we photostat something, obviously, we have to photostat both sides and,

therefore, get two sheets. Now, just by illustration, A-1 in the original, which I have before me, is just one sheet of matter, written on both sides, [24] and I don't believe that, when we place in evidence an offer in compromise, it would be fair or complete to place in evidence anything less than the entire document.

The Court: Is Exhibit A-2 on the reverse side of Exhibit A-1?

Mr. Oakes: Yes, your Honor.

The Court: Does the stipulation so indicate?

Mr. Oakes: Yes, I think it is fairly clear that took place.

The Court: What is wrong with that?

Mr. Diehl: Not a thing. The fact of the matter is I don't object to the inclusion of any evidence. I think it can all be in there and probably should be to show the whole story.

The Court: You have only one thing in this case, just one issue, the question as to whether or not this agreement can extend the statute indefinitely?

Mr. Diehl: That is right.

The Court: Everything else is merely explanatory, I imagine.

Mr. Diehl: I don't really think your Honor will have any trouble regardless of how much we may say in our briefs about something being irrelevant and immaterial. And I will withdraw my objections.

The Court: You withdraw your objection? [25]

Mr. Diehl: Yes.

The Court: Then may it be understood—or what is the understanding with respect to Paragraph VIII? Shall this matter be submitted to the court, subject to objections to be made later on, or not?

Mr. Bryant: Does your Honor mean Paragraph XVIII?

The Court: Yes; Paragraph XVIII.

Mr. Oakes: If your Honor wants it submitted, I presume both sides could agree that this is all that is going to appear before your Honor. There is no further evidence on either side. The government doesn't have any evidence now and is willing to waive the right to present any further evidence.

The Court: What I referred to is this. While this is a stipulation, yet it isn't, because this paragraph recites that "Either party may, at the time of trial or writing briefs herein or any other time question the relevancy and/or materiality of any of the facts or exhibits herein stipulated." The court is unwilling to accept the conclusion of a trial in that form. That doesn't conclude the trial.

Mr. Diehl: I am perfectly willing to strike that portion of the stipulation.

Mr. Oakes: We will join with opposing counsel in that suggestion.

The Court: Paragraph XVIII may be stricken from the [26] stipulation of facts, may it?

Mr. Diehl: I think the entire paragraph. We have introduced additional evidence and it is in. I think the whole paragraph should be stricken.

The Court: I think this may be done by additional stipulation instead of striking it, without making a physical striking at this time. Or would you prefer to strike it out now by running lines through it?

Mr. Oakes: In the event of possible appeal, it might be simpler to have it stricken, the entire Paragraph XVIII, and we could stipulate the clerk could strike Paragraph XVIII.

Mr. Diehl: That is agreeable.

The Court: It is agreeable to both sides that Paragraph XVIII may be stricken from the stipulation, is that correct?

Mr. Diehl: Yes, that is correct.

Mr. Oakes: That is correct, your Honor.

The Court: It is so ordered. However, that doesn't take with it the striking of the testimony offered by the plaintiff in this case today.

Mr. Oakes: Yes; that is what the government has in mind, that this Paragraph XVIII relates exclusively to the preceding seventeen paragraphs in the stipulation and does not relate to the transcript wherein the taxpayer testified.

The Court: Then, the testimony as submitted today may [27] stand as having been—

Mr. Diehl: Yes; I think there is no difficulty there. It merely states "the following facts are true."

Mr. Oakes: Again for the purposes of the record, the taxpayer's testimony stands subject to the rulings your Honor has made to certain portions?

The Court: Yes. I think we had better cover that with a stipulation, a written stipulation. You can cover that with a written stipulation, can you not?

Mr. Oakes: Yes, your Honor.

The Court: Then, that will be in the file and that will constitute a better record.

Mr. Oakes: I will prepare it and forward it and send a copy to counsel.

The Clerk: I have already stricken it, your Honor.

The Court: You gentlemen may initial this and the record may show that the striking of this paragraph is covered by a written stipulation to be filed.

Mr. Oakes: Does your Honor want the record to show that you are receiving this in evidence or that it is filed?

The Court: This stipulation may be received in evidence. That is agreeable to both sides, is it?

Mr. Diehl: Yes, your Honor.

Mr. Oakes: And I believe the plaintiff has heretofore rested, and, now that the submission is in evidence, the [28] government will accordingly rest. The defendant rests.

The Court: We should have arguments and briefs. I imagine you would like to file written arguments and briefs.

Mr. Diehl: If the court please, I think probably we should confine it to written arguments and briefs and not attempt any oral arguments at this time.

Mr. Oakes: May I suggest, your Honor, I believe the usual practice is that the taxpayer can file an opening brief and we can reply and then he can file a reply brief and, after the issues are somewhat clarified by that process, if your Honor would desire it, then we could come in and discuss it?

Mr. Diehl: That is all right.

The Court: That course may be followed. How long do you want to file your opening brief and argument?

Mr. Diehl: 10 days.

The Court: Do you want longer?

Mr. Diehl: I think I can do it in 10 days.

The Court: All right. And you want 10 days, do you?

Mr. Oakes: Mr. Bryant just reminded me that our docket is a little heavy. Would 20, 20 and 10 be more feasible?

Mr. Diehl: That is all right, your Honor.

The Court: Very well; 20, 20 and 10, will be all right.

The Clerk: That will run into the criminal calendar, your Honor. [29]

Mr. Oakes: Those are the dates on which we will get in those three briefs?

The Court: I couldn't take this matter under submission during the time I have the criminal calendar. I begin that on the 29th of March.

Mr. Oakes: If it is agreeable to Mr. Diehl, any subsequent date after your criminal calendar we will appear for any oral argument.

The Court: I may not require oral arguments.

Mr. Oakes: We can leave that in this way—

The Court: I don't think this is a very complicated situation. It is purely a question of law.

Mr. Diehl: That is correct.

The Court: There are no facts that seem to control the situation other than what you have set out in your stipulation. We can set it down for March 31st for further presentation or arguments and I can continue that until—I have the criminal calendar in April, May and June.

Mr. Diehl: The plaintiff is willing to shorten the period within which to file briefs if that will help the situation.

Mr. Oakes: If it will expedite the matter, your Honor, 15 and 15 and 7 or something like that, which will put us through a lot sooner.

The Court: It won't make any difference to me. [30]

Mr. Oakes: Or two weeks, two weeks and one week. The government does feel that, as this case will require your Honor to interpret unlimited waivers, and the government has had a great many of them decided, there could be an important precedent and possibly it might require a careful presentation. And we would like to

see it set for oral argument as well as thorough briefing, and with that in mind—

The Court: That is right. After you have filed your arguments and briefs, I may want some oral argument following that.

Mr. Oakes: And the government would like to present it also orally at that time as well as giving our views in written form.

The Court: I will be pretty busy with the criminal calendar. So I won't have much time to digest matters. Follow the course that has been outlined, 20, 20 and 10, and we will put it on the calendar for March 31st for oral argument. I think I will have time on that day to take the civil calendar in the afternoon.

Mr. Bryant: Is this matter at 2:00 p. m., your Honor?

The Court: 2:00 p. m., on March 31st. Do you want today's record written up?

Mr. Bryant: Yes, your Honor. That will be requested.

Mr. Diehl: And the plaintiff also.

The Court: And will you see that the court is furnished [31] with a copy?

Mr. Bryant: The government cannot furnish a copy, your Honor. However, there will be one in the clerk's file as long as one is ordered by either party.

The Court: Then the court can resort to the one on file.

(Recess.)

[Endorsed]: Filed Jul. 13, 1948. Edmund L. Smith, Clerk. [32]

[Endorsed]: No. 11973. United States Circuit Court of Appeals for the Ninth Circuit. E. C. Simmons, Appellant, vs. Harry C. Westover, Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 14, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 11973

E. C. SIMMONS,

Appellant,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,
Appellee.

STATEMENT OF POINTS AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

I.

STATEMENT OF POINTS

Appellant intends to rely upon the following points:

(1) The District Court erred in entering judgment for the appellee.

(2) The District Court erred in failing to enter judgment for appellant in the amount of \$3,159.27 as prayed for, plus interest and costs of suit.

(3) The District Court erred in failing to find or conclude that appellant had overpaid his federal income taxes and interest thereon for the calendar year 1925 in the amount of \$3,159.27.

(4) The District Court erred in failing to find or conclude that the collection from appellant by appellee of \$3,159.27 in federal income taxes and interest for the calendar year 1925 was, on the date of said collection, to-wit, November 14, 1945, barred by the provisions of Section 276(c) of the Internal Revenue Code (26 U. S. C. A., Section 276(c)).

(5) The District Court erred in failing to find or conclude that the Tax Collection Waiver dated July 5, 1933 (Exhibit C attached to the Stipulation of Facts), was void ab initio.

(6) The District Court erred in failing to find or conclude that said Tax Collection Waiver (Exhibit C), if not void ab initio, was effective for only a reasonable length of time and that the time elapsed from the date thereof until the date of collection of the tax and interest for the calendar year 1925 was more than a reasonable length of time.

(7) The District Court erred in failing to find or conclude that said Tax Collection Waiver (Exhibit C), if not void ab initio, was, in any event, superseded and rendered no longer effective by the provisions of the Offer in Compromise dated April 23, 1936 (Exhibits D-1 and D-2 attached to the Stipulation of Facts).

II.

DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Appellant respectfully submits that all of the record on appeal, as certified to you, will be necessary for the consideration of the points upon which appellant intends to rely. Accordingly, appellant requests you to have printed the entire record on appeal in this case.

LATHAM & WATKINS

By Henry C. Diehl

1112 Title Guarantee Building

Los Angeles 13, California

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1948. Paul P. O'Brien,
Clerk.